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EDITOR'S NOTE

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>. 84-1923-CFX
:atus: GRANTED

>cketed:
,ne 7, 1985

Title: Otis R. Bowen, Secretary of Health and Human Services, et al., Petitioners
v.
City of New York, et al.

Court: United States Court of Appeals for the Second Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Rubenstein, Leonard S., Schwarz Jr., Frederick A.O., Gordon, Judith A., Doskow, Ambrose

>try	Date	Note	Proceedings and Orders
1	Apr 26 1985		Application for extension of time to file petition and order granting same until June 7, 1985 (Marshall, April 26, 1985).
2	Jun 7 1985	G	Petition for writ of certiorari filed.
4	Jun 20 1985		Order extending time to file response to petition until August 10, 1985.
5	Jun 20 1985		Above extension is for ALL RESPONDENTS.
6	Jun 27 1985		Application for stay filed.
7	Jun 28 1985		Response requested. Due 6/29/85 - Noor.
8	Jun 28 1985		DISTRIBUTED. July 1, 1985. (Application for stay).
9	Jun 29 1985		Respondents' opposition to application filed.
10	Jul 1 1985		Supplemental memorandum of respondents' filed.
11	Jul 1 1985		Reply of the United States filed.
12	Jul 1 1985		The application for a partial stay of the judgment of the United States District Court for the Eastern
13	Jul 1 1985		District of New York, case No. CV-83-0457, as set forth in the January 31, 1984 order, presented to Justice
14	Jul 1 1985		Marshall and by him referred to the Court is GRANTED pending the disposition by this Court of the petition
15	Jul 1 1985		for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates
16	Jul 1 1985		automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue
17	Jul 1 1985		pending the sending down of the judgment of this Court.
18	Aug 12 1985		Brief of respondents City of New York, et al. in opposition filed.
19	Aug 14 1985		DISTRIBUTED. September 30, 1985
20	Oct 1 1985	X	Reply brief of petitioners Heckler, Sec. of HHS, et al. filed.
21	Oct 7 1985		Petition GRANTED.
			**********
23	Nov 18 1985		Order extending time to file brief of petitioner on the merits until December 6, 1985.
24	Dec 6 1985		Record filed.
25	Dec 6 1985		Certified copy of original record and proceedings, 2 boxes, received.
26	Dec 6 1985		Order further extending time to file brief of petitioner on the merits until December 9, 1985.

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ntry	Date	Note	Proceedings and Orders
27	Dec 9 1985		Brief of petitioners Heckler, Sec. of HHS, et al. filed.
29	Dec 21 1985		Order extending time to file brief of respondent on the merits until January 28, 1986.
30	Dec 21 1985		Above extension applies to all respondents.
31	Jan 7 1986		SET FOR ARGUMENT, Wednesday, February 26, 1986. (4th case).
32	Jan 24 1986		CIRCULATED.
33	Jan 28 1986	X	Brief of respondents The City of New York, et al. filed.
35	Jan 27 1986	X	Brief amicus curiae of American Bar Association filed.
36	Jan 27 1986	X	Brief amicus curiae of National Institute of Municipal Law Officers filed.
37	Jan 27 1986	X	Brief amicus curiae of Association of the Bar of NY filed.
38	Jan 27 1986	X	Brief amicus curiae of American Psychiatric Association filed.
39	Jan 27 1986	X	Brief amicus curiae of Alabama, et al. filed.
40	Jan 27 1986	X	Brief amicus curiae of Chicago filed.
41	Jan 28 1986	X	Brief amicus curiae of ACLU, et al. filed.
42	Jan 29 1986		Joint appendix filed.
43	Feb 19 1986	X	Reply brief of petitioners Heckler, Sec. of HHS, et al. filed.
44	Feb 26 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

84-1923

No.

Office - Supreme Court, U.S.
FILED
JUN 10 1985
ALEXANDER L. STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in this class action under 42 U.S.C. 405(g) challenging the interpretation and application by the Secretary of Health and Human Services of regulations pertaining to eligibility for disability benefits under the Social Security Act, the district court correctly included within the class numerous claimants who had not exhausted their administrative remedies and therefore had not obtained a "final decision" of the Secretary on their individual claims for benefits.

2. Whether, in light of the requirement in 42 U.S.C. 405(g) that a claimant must seek judicial review within 60 days of the Secretary's final decision on his claim for benefits, the district court correctly included within the class numerous claimants who had received a final decision on their individual claims for benefits more than 60 days before this class action was filed.

3. Whether, if the district court did not have jurisdiction under 42 U.S.C. 405(g) over the claims of those class members who had received a final decision more than 60 days before this class action was filed, the court nevertheless could assert jurisdiction over those same claims under the mandamus statute, 28 U.S.C. 1361.

PARTIES TO THE PROCEEDINGS

The petitioners are Margaret M. Heckler, Secretary of Health and Human Services, and Martha McSteen, the Acting Commissioner of Social Security.

The eight individual respondents are Jane Does I-III and Richard Roes I-V. These eight respondents are representatives of the following class certified by the district court (App., *infra*, 36a):

> All individuals residing in the State of New York who have applied for or received Title II and/or Title XVI benefits and who, between April 1, 1980 and May 15, 1983, were found by the New York State Office of Disability Determinations to have a functional psychotic or functional non-psychotic mental impairment which is severe (i.e., determined under 20 C.F.R. § 404.1520(c) or § 416.930(c) to require evaluation under Appendix I of that Regulation), and whose applications for benefits have been denied or whose benefits have been or will be terminated, on the basis of defendants' determination that such persons are capable of substantial gainful activity.

The governmental respondents are the City of New York, the New York City Health and Hospitals Corporation, the State of New York, the Commissioner of the New York State Department of Social Services, and the Commissioner of the New York State Office of Mental Health.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services and the Acting Commissioner of Social Security, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 742 F.2d 729, and the opinion of the court of appeals denying the Secretary's petition for rehearing (App., *infra*, 24a-29a) is reported at 755 F.2d 31. The opinion of the district court (App., *infra*, 30a-63a) is reported at 578 F. Supp. 1109.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1984, and a petition for rehearing was denied on February 7, 1985 (App., *infra*, 24a-29a). By order dated April 29, 1985, Justice Marshall extended the time

within which to file a petition for a writ of certiorari to and including June 7, 1985. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 205(g) of the Social Security Act, 42 U.S.C. 405(g); Section 5 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1801; and 20 C.F.R. 404.1520 are reproduced at App., *infra*, 71a-77a.

STATEMENT

This is a class action brought on behalf of New York residents challenging the interpretation by certain Social Security Administration personnel of several regulations that implement the substantive standards of eligibility for disability benefits under Title II and Title XVI of the Social Security Act. The merits of the dispute are not at issue here. Instead, in this petition, we seek review of the court of appeals' affirmance of the district court's sweeping judgment that: (i) awarded relief to those class members who were still in the process of exhausting their administrative remedies when that judgment was entered; and (ii) ordered the Secretary to reopen administrative decisions denying the claims of thousands of other class members that had become final and binding when the claimants involved failed to seek further administrative review or judicial review within 60 days. Under this Court's rulings, the district court clearly had no jurisdiction over the claims of these class members under 42 U.S.C. 405(g) or 28 U.S.C. 1361.

A. The Statutory and Regulatory Framework

Title II of the Social Security Act provides, inter alia, for the payment of disability insurance benefits to persons whose disability prevents them from pursuing gainful employment. 42 U.S.C. 423. Disability benefits also

are payable under the Supplemental Security Income (SSI) Program established by Title XVI of the Act. 42 U.S.C. 1382(a). "The disability programs administered under Titles II and XVI 'are of a size and extent difficult to comprehend.' *Richardson* v. *Perales*, 402 U.S. 389, 399 (1971). Approximately two million disability claims were filed under these two titles in fiscal year 1983." *Heckler* v. *Day*, No. 82-1371 (May 22, 1984), slip op. 2 (footnote omitted). To aid in the administration of these programs, the Secretary of Health and Human Services has promulgated detailed regulations governing both the procedures for the adjudication of claims for benefits and the substantive standards of eligibility.

1. *Procedural Provisions*

"To facilitate the orderly and sympathetic administration of the disability program[s] * * *, the Secretary and Congress have established an unusually protective * * * process for the review and adjudication of disputed claims." *Heckler* v. *Day*, slip op. 2. If it is determined at any stage of this multi-stage process that the individual is eligible for benefits (and if the individual has not been receiving benefits during that review process (see pages 5-6, *infra*)), he is entitled to retroactive payments for the period of his eligibility. See *Mathews* v. *Eldridge*, 424 U.S. 319, 339 (1976).

a. Congress has directed that the determination whether an individual is under a disability shall be made in the first instance by a state agency, pursuant to regulations, guidelines, and performance standards established by the Secretary through the Social Security Administration (SSA). 42 U.S.C. 421(a), 1383b(a); 20 C.F.R. 404.1503, 416.903. See *Heckler* v. *Day*, slip op. 2, 12. The first stage of administrative review is the initial determination, which the state agency renders on the basis of its consideration of an application submitted by a person seeking benefits for the first time or on the basis of the agency's assessment of the continuing eligi-

bility of a person who already is receiving benefits. The Secretary, on her own motion, may review the determination by the state agency that a person is or is not under a disability. 42 U.S.C. 421(c)(1). In addition, Congress has directed the Secretary to review specified percentages of determinations by state agencies in cases under Title II in which the claimant is found to be disabled. 42 U.S.C. 421(c)(2) and (3). This quality review process was instituted because of Congress's concern about a "marked loss of quality and uniformity" in state agency decisions. *Heckler* v. *Day*, slip op. 13 n.29. The review of state agency decisions is performed by SSA's regional office (Tier II), and the regional office's performance in turn is subject to review by SSA's central office in Baltimore (Tier III). See App., *infra*, 34a-36a.

b. If the state agency makes an initial determination that a new applicant is not disabled or that the disability of a current recipient has ceased, the individual may request a de novo reconsideration by the state agency. 20 C.F.R. 404.904, 404.907-404.921, 416.1405, 416.1407-416.1421.[1] Governing regulations provide—and the individual is explicitly notified—that he must request reconsideration within 60 days of his receipt of the adverse initial determination. 20 C.F.R. 404.904, 404.909(a)(1), 416.1404, 416.1409(a). If he does not do so, the adverse initial determination becomes "binding" upon the claimant. 20 C.F.R. 404.905, 416.1405.

c. Under 42 U.S.C. 421(d), if an individual is dissatisfied with the decision by the state agency after its initial determination and reconsideration of the claim, he "shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in [42 U.S.C. 405(b)]." See also 42 U.S.C. 1383(c)(1); 20 C.F.R. 404.944-

[1] The Secretary has not provided for a separate reconsideration stage in disability cessation cases under Title XVI. A SSI recipient therefore is entitled to an administrative law judge hearing after receiving notice of an initial determination that his entitlement has ceased. 20 C.F.R. 416.1407, 416.1415.

404.965, 416.1429-416.1465. The Act requires that an individual request such a hearing within 60 days of the state agency decision (42 U.S.C. 405(b)(1), 1383(c)(1)), and implementing regulations expressly provide that the state agency's decision that the claimant is not disabled becomes "binding" unless he requests a hearing within that period. 20 C.F.R. 404.920(a), 404.921, 404.933(b), 416.1404(b)(3), 416.1405, 416.1420(a), 416.1421, 416.1433(b).

The evidentiary hearing is conducted by an administrative law judge (ALJ) within SSA's Office of Hearings and Appeals. The ALJ is directed to "look[] fully into the issues" (20 C.F.R. 404.929, 404.944, 416.1429, 416.1444). See *Heckler* v. *Campbell*, 461 U.S. 458, 469 n.12 (1983). Although the ALJ must follow the Social Security Act, implementing regulations, and formal Social Security rulings (SSRs) (20 C.F.R. 422.408), the ALJ is not bound by the Programs Operations Manual System (POMS) and other instructional material that SSA's Office of Operational Policies and Procedures transmits to the state agencies to guide them in their preliminary evaluation of disability claims. See *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), slip op. 2; S. Rep. 94-466, 98th Cong., 2d Sess. 18-19 (1984); H.R. Rep. 98-618, 98th Cong., 2d Sess. 20-22 (1984).

Because eligibility for SSI benefits is based on need (42 U.S.C. 1382(a)), the Secretary implemented this Court's decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), by providing that, if an individual has been receiving benefits under Title XVI, payment of those benefits may be continued after an initial determination by the state agency that he no longer is eligible for disability benefits until the ALJ in SSA has rendered a decision on the claim. 20 C.F.R. 416.1336(b). By contrast, this Court held in *Mathews* v. *Eldridge*, *supra*, that in the case of disability benefits under Title II, which are not based on need, the Due Process Clause does not require the Secretary to continue payments following an adverse

state agency determination until the individual has an opportunity for an ALJ hearing in SSA. 424 U.S. at 339-349.

Notwithstanding the holding in *Eldridge*, Congress enacted temporary legislation in 1982 permitting the claimant in a Title II disability cessation case to elect to continue to receive benefits pending receipt of the ALJ's decision, subject to recoupment if the ALJ agrees with the state agency that the claimant's disability has ceased. 42 U.S.C. 423(g), as added by Pub. L. No. 97-455, § 2, 96 Stat. 2498. In the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 7(a)(2), 98 Stat. 1803, Congress extended that authorization until January 1, 1988. Congress in the 1984 Act also enacted a specific statutory authorization for the continued payment of SSI benefits under Title XVI pending an ALJ decision if the state agency has made an initial determination that the individual's disability has ceased. § 7(b), 98 Stat. 1803 (to be codified at 42 U.S.C. 1383(a)(7)). By contrast, Congress has not provided any similar authorization for the payment of benefits during the administrative appeals process to *new applicants* who were found by the state agency not to be disabled.

d. If the decision by the ALJ after a hearing under either Title II or Title XVI is adverse to the claimant, he then may seek review by the Appeals Council in SSA. 20 C.F.R. 404.967-404.983, 416.1467-416.1483. The regulations provide that if the claimant does not seek Appeals Council review within 60 days or such further period as the Secretary permits, the ALJ's decision is "binding." 20 C.F.R. 404.955(a), 404.968(a)(1), 416.1455(a), 416.1468.

e. Only after the Appeals Council has either denied review of the ALJ's decision, or has granted review and rendered its own decision on the merits, is the Secretary deemed to have rendered her "final decision" or "final determination" on the claim, which is then subject to judicial review in federal district court pursuant to

42 U.S.C. 405(g). See 42 U.S.C. 421(d), 1383(c)(3); 20 C.F.R. 404.900(a)(5), 404.981, 416.1400(a)(5), 416.1481. The Act requires that judicial review be "commenced within sixty days after the mailing to [the claimant] of notice" of the Secretary's final decision, "or within such further time as the Secretary may allow." 42 U.S.C. 405(g). If judicial review is not sought within the time allowed, the Appeals Council's decision (or the ALJ's decision, if the Appeals Council denied review) becomes "binding" upon the claimant. 20 C.F.R. 404.981, 404.982, 416.1481, 416.1482.

f. Although an adverse decision at any step of the administrative process becomes final and binding upon the claimant if he does not seek further review within the time allowed, the Secretary has provided by regulation that such a decision may be reopened within 12 months for any reason, within two or four years for good cause, and at any time if the decision was obtained by fraud or similar fault. 20 C.F.R. 404.987-404.989, 416.1487-416.1489. However, the Secretary's denial of a request to reopen is not subject to administrative or judicial review. 20 C.F.R. 404.903(l), 416.1403(a)(5). See *Califano* v. *Sanders*, 430 U.S. 99, 108 (1977).

2. *Substantive Provisions*

Under Title II and Title XVI of the Social Security Act, disability benefits may be paid to an individual who has a "medically determinable physical or mental impairment" that is "of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(1)(A) and (2)(A), 1382c(a)(3)(A) and (B). In 1978 the Secretary promulgated regulations implementing these statutory definitions of the term "disability." *Heckler* v. *Campbell*, 461 U.S. at 461. See 20 C.F.R. Pt. 404, Subpt. P.; *id.* Pt. 416, Subpt. I.

The regulations establish a five-step "sequential evaluation" approach for determining whether a person is disabled. 20 C.F.R. 404.1520(a), 416.920(a). At the first step, the state agency official or the ALJ determines whether the claimant is engaged in work that constitutes substantial gainful activity. If so, the claimant will be found not to be disabled, and the sequential evaluation process goes no further. 20 C.F.R. 404.1520(b), 416.920(b). At the second step, the decision-maker decides whether the claimant's impairment is "severe"—*i.e.*, whether it limits his "physical or mental ability to do basic work activities" (20 C.F.R. 404.1520(c), 404.1521, 416.920(c), 416.921). This threshold severity determination is made on the basis of medical factors alone, without consideration of the claimant's age, education, or work experience. If the impairment is not "severe," the claimant is found not to be disabled.

At the third step, the state agency official or ALJ determines whether the claimant's physical or mental impairment meets or equals any of the listed impairments that are deemed to be disabling without considering the claimant's age, education, or work experience. 20 C.F.R. 404.1520(d), 416.920(d). If the claimant's impairment does not meet or equal the listings, step four of the sequential evaluation process provides for the decision-maker to determine the claimant's "residual functional capacity" (RFC). In making this determination in the case of a mental impairment, the relevant factors include the claimant's "ability to understand, to carry out and remember instructions, and to respond appropriately to supervision, co-workers and work pressures in a work setting." 20 C.F.R. 404.1545(c), 416.945(c). The decision-maker then must determine whether the individual's RFC permits him to do his past work. If he can, he is found not to be disabled. 20 C.F.R. 404.1520(e), 416.920(e).

If the claimant cannot do his past work, the decision-maker then proceeds to step five, at which he must

consider the claimant's RFC, together with the vocational factors of age, education, and work experience, in order to determine whether the claimant can do other jobs that exist in the national economy. 20 C.F.R. 404.1520(f), 416.920(f). This determination at step five ordinarily is made by reference to the medical-vocational guidelines, which set forth rules to identify whether jobs requiring specific combinations of attributes exist in the national economy. 20 C.F.R. Pt. 404., Subpt. P, App. 2. See generally *Heckler* v. *Campbell*, 461 U.S. at 460-462, 467-468; App., *infra*, 3a, 32a-33a.

B. The Proceedings In This Case

1. a. This class action was filed in the United States District Court for the Eastern District of New York on February 8, 1983 (C.A. App. 8-32), and an amended complaint was filed on October 11, 1983 (C.A. App. 54-88). The named plaintiffs, respondents herein, are eight individuals (identified as Jane Does I-III and Richard Roes I-V) who had received or applied for disability benefits under Title II or Title XVI of the Social Security Act (C.A App. 12-15, 59-66), and the City of New York, the New York City Health and Hospitals Corporation, the State of New York, and two state officials (C.A. App. 11-12, 58-59).

The plaintiffs challenged an interpretation of the sequential evaluation regulations given by certain SSA personnel to the state agency responsible for making disability determinations in New York (C.A. App. 22-27, 74-81). Several memoranda reflecting the interpretation stated that if the claimant's mental impairment is found at step three of the sequential evaluation process not to meet or equal the listings, it will "generally follow" that the claimant has the RFC at least for unskilled work and that a finding of disability at step four or five, while "possible," is "rare" (C.A. App. 22-23, 75-76). Plaintiffs contended that these and other memoranda gave "improper weight" to the fact that the claimant's impair-

ment did not meet or equal the listings and in effect created a "presumption" that such a claimant is able to do unskilled work, without an adequate individualized evaluation of his capacity to engage in substantial gainful activity. In the plaintiffs' view, such an evaluation should consider such factors as the claimant's recent prior work history, his reaction to stressful situations, the risk and effect of a possible recurrence of symptoms, and an analysis of the claimant's performance in a work-like setting (C.A. App. 29-30, 83). The plaintiffs also alleged that the interpretation of the regulations they challenged was applied by SSA, in the Tier II and Tier III quality review process (see pages 3-4, *supra*), in reversing initial determinations by the New York state agency that particular claimants were disabled on the basis of mental impairment (C.A. App. 25, 79).

b. Before this suit was filed, another district court had granted a preliminary injunction in a class action raising a similar challenge. *Mental Health Association* v. *Schweiker* (*Minnesota Mental Health*), 554 F. Supp. 157 (D. Minn. 1982), aff'd, 720 F.2d 965 (8th Cir. 1983). In response to that suit, the Commissioner of Social Security, on January 3, 1983, sent a memorandum to all Regional Commissioners of SSA, all SSA field assessment officers, and all state agencies that make disability determinations (DX M (App., *infra*, 69a-70a)). The Commissioner's memorandum made clear that a finding that a claimant is able to engage in substantial gainful activity *cannot* be justified solely on the basis of a finding at step three of the sequential evaluation process that the mental impairment does not meet or equal the listings. Instead, the memorandum stressed that, under existing regulations and POMS instructions, the sequential evaluation process must continue to a consideration at steps four and five of the claimant's RFC and vocational factors. *Ibid.* The Commissioner's memorandum instructed the Regional Commissioners and SSA field assessment officers to work with state agency administrators "immediately" in order "to assure that these principles are reviewed with every adjudicator" (*id.* at 69a).[2]

c. The district court in the instant case rendered its decision on January 11, 1984 (App., *infra*, 30a), more than a year after the Commissioner sent the corrective instructions just discussed. The court acknowledged that the challenged interpretation was no longer in effect (*id.* at 39a).[3] Nevertheless, the district court reached the merits of that interpretation, found it to be contrary to the Act and regulations, and ordered broad relief to the members of the certified class (*id.* at 31a-42a, 60a-63a). That class, as amended, consists of all New York residents who, between April 1, 1980 and May 15, 1983, were found by the New York state agency to have a severe functional psychotic or functional non-psychotic mental impairment that did not meet or equal the listings, and whose applications had been denied or benefits terminated because of the Secretary's determination that they were capable of performing substantial gainful activity (*id.* at 65a). The court rejected the Secretary's contention that it could not include with-

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[2] Subsequently, on June 7, 1983, the Secretary announced a moratorium, pending consultation with experts and development of new standards and procedures, in the continuing disability review of persons receiving benefits on the basis of a mental disability that is a functional psychotic disorder. S. Rep. 98-466, *supra*, at 19.

[3] The district court stated that an administrative "change" was precipitated by the filing of the instant suit as well as the decision in *Minnesota Mental Health* (App., *infra*, 39a). As noted in the text, however, the Commissioner had sent corrective instructions to the Regional Commissioners and state agencies even before this suit was filed. Moreover, the Commissioner's memorandum of January 3, 1983 did not state that SSA's official policy had changed. To the contrary, in another memorandum dated January 3, 1983 to the appropriate SSA regional office, the Commissioner stated that the approach suggested in the regional office memoranda to the state agencies that were at issue in *Minnesota Mental Health* was *inconsistent* with the requirements of the sequential evaluation process established by the regulations and implementing POMS instructions (DX L).

in the class under 42 U.S.C. 405(g) any persons who had not exhausted their administrative remedies or sought judicial review within 60 days of the Secretary's final decisions denying their individual claims for benefits (App., *infra*, 43a-46a, 59a-60a). As relief, the court ordered the Secretary to reopen all adverse administrative decisions affecting the class members, although it provided that any class member who had an active administrative appeal of such a state agency decision pending before an ALJ or the Appeals Council could elect to have his case decided on that appeal instead of by reopening (App., *infra*, 65a-66a).[4]

2. a. The court of appeals affirmed the district court's judgment, rejecting the Secretary's jurisdictional arguments (App., *infra*, 1a-23a). The court of appeals acknowledged that the Secretary had not waived the requirement under 42 U.S.C. 405(g) that a claimant exhaust his administrative remedies through the Appeals Council stage, but it concluded that "judicial waiver" of that requirement was appropriate (App., *infra*, 13a). The court reached this result by following what it termed a "general approach" to the exhaustion question, under which "no one factor is critical" and a court may "balanc[e] the competing considerations to arrive at a just result under the circumstances presented" (*ibid.*).

[4] The district court also ordered the payment of interim benefits, pending reopening and redetermination, to class members who previously were found to be disabled but whose benefits were terminated (App., *infra*, 66a). The district court granted a stay of its judgment pending a decision by the court of appeals, except for those portions of the judgment that required the Secretary to identify all members of the class, to pay interim benefits on a prospective basis to class members who were terminated pursuant to the Continuing Disability Investigation review program, and to implement the judgment for all class members who then had appeals pending before an ALJ or the Appeals Council or who received a final decision after a hearing on or after this action was filed on February 8, 1983 (*id.* at 67a-68a). The court of appeals denied the Secretary's motion for a stay of those portions of the judgment (*id.* at 8a).

Applying this approach, the court of appeals acknowledged that the class members' argument that the Secretary had failed to assess their RFC on an individualized basis was not "wholly" collateral to their claims for benefits, as this Court had required in *Mathews* v. *Eldridge*, 424 U.S. 319, 330 (1976), and *Heckler* v. *Ringer*, slip op. 14 (App., *infra*, 14a). But the court found it sufficient that that argument was "substantially" collateral, distinguishing *Ringer* on the ground that it involved a challenge to the Secretary's "substantive standards," while in this case the plaintiffs were challenging what the court characterized as a "procedural irregularity" (*ibid.*). The court also concluded that it could excuse exhaustion of administrative remedies because, in its view, exhaustion would be "futile" (*id.* at 15a).

The court of appeals acknowledged that some individual class members could have prevailed on their claims for benefits if they had pursued administrative appeals, but it reasoned that their asserted "procedural right" to have the Secretary make an individualized assessment of RFC could not be vindicated on such an appeal (App., *infra*, 15a). The court also believed that the claimants should not have to undergo the "ordeal" of pursuing the administrative process (*id.* at 14a). The court added that it saw no reason to require exhaustion in order to allow the SSA to apply its " 'experience and expertise' " and " 'correct its own error' " (*id.* at 15a, quoting *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975))—despite the fact that the Commissioner of Social Security already had corrected the agency's error before this suit was filed (see pages 10-11, *supra*).

b. The court of appeals also held that this action could be pursued by all members of the class—which includes any New York resident who was found by the state agency not to be disabled at any time on or after April 1, 1980, almost three years before this suit was filed—notwithstanding the requirement in 42 U.S.C. 405(g) that a claimant seek judicial review within 60 days of

the Secretary's final decision on his claim for benefits (App., *infra*, 15a-18a). The court noted that this Court's position on whether the 60-day requirement is jurisdictional in nature "is not free from doubt" (*id.* at 16a) and that there is a conflict in the circuits on that question (*id.* at 17a). But "[i]n the absence of an authoritative ruling by the Supreme Court to the contrary," the court decided to adhere to prior Second Circuit precedent that the 60-day requirement is not jurisdictional (*ibid.*).

The court of appeals then further held that the running of the 60-day period should be "tolled" during the time that "SSA's policy of applying the challenged presumption concerning residual functional capacity remained operative but undisclosed" (App., *infra*, 18a). The court acknowledged that the individual class members knew of the denial or loss of their benefits, notice of which triggers the running of the 60-day period under the terms of 42 U.S.C. 405(g), but it excused compliance with the 60-day filing requirement on the ground that the claimants did not know that the basis of those decisions was a systematic "procedural irregularity" that rendered them subject to court challenge (App., *infra*, 18a). In the alternative, the court of appeals held that, even if the district court did not have jurisdiction over the claims of certain class members under 42 U.S.C. 405(g) because of the 60-day bar, the court could exercise mandamus jurisdiction under 28 U.S.C. 1361 to order the reopening of those same claims (App., *infra*, 19a-20a).

REASONS FOR GRANTING THE PETITION

This Court repeatedly has made clear that a class may be certified in an action arising under the Social Security Act only if each of the class members individually satisfies the requirements prescribed by 42 U.S.C. 405(g). *Califano* v. *Yamasaki*, 442 U.S. 682, 701, 704 (1979); *Mathews* v. *Diaz*, 426 U.S. 67, 71 n.3 (1976); *Weinberger* v. *Salfi*, 422 U.S. 749, 764 (1975); *Heckler* v.

Lopez, No. A-145 (Oct. 11, 1983), slip op. 3 (Stevens, J., dissenting in part). Yet in this case, the court of appeals held that the district court correctly included within the class thousands of claimants who did not obtain the requisite "final decision" of the Secretary on their claims for benefits or seek judicial review within 60 days of that final decision. In place of the clear-cut exhaustion rule, the court of appeals substituted an ad hoc "balancing" approach that allows a court to dispense with the exhaustion requirement if necessary to achieve what the court deems to be a "just result" in the particular "circumstances presented" (App., *infra*, 13a). This holding is flatly inconsistent with the rulings of this Court, as recently as a year ago in *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984). See also *Mathews* v. *Eldridge*, 424 U.S. 319 (1976); *Weinberger* v. *Salfi*, *supra*.

Similarly, the court of appeals' view that a court may fashion its own rules to excuse a claimant's failure to satisfy the 60-day filing requirement in 42 U.S.C. 405 (g) cannot be squared with the decisions of this Court holding that conditions on waivers of sovereign immunity define the jurisdiction of the court and must be strictly construed. What is more, the rationale adopted by the court of appeals—that the 60-day filing requirement may be ignored on a statewide basis because the interpretation of the challenged regulations allegedly applied in New York was not published—apparently would dispense with that requirement whenever a construction of the Act or implementing regulations that underlies a particular denial of benefits is reflected in internal operating instructions.

The court of appeals' rulings disregarding the explicit "final decision" and 60-day requirements of 42 U.S.C. 405(g) conflict with the decisions of other courts of appeals and threaten to make chaos of the "orderly administrative mechanism" established by the Social Security Act and implementing regulations for the processing

of millions of claims annually. *Califano* v. *Sanders*, 430 U.S. 99, 102 (1977). Where, as here, the courts disregard the governing principles in massive class actions involving thousands of claimants, the result is to require the reopening of thousands of administrative decisions that the claimants themselves had allowed to become final and binding when they failed to pursue their administrative remedies or to seek judicial review within the applicable time limits. Review by this Court therefore is plainly warranted.

1. a. The court of appeals clearly erred in affirming the district court's judgment that included within the class numerous individuals who had not exhausted their administrative remedies through the Appeals Council stage. Section 405(g) provides that an individual may obtain judicial review only after the Secretary has rendered her "final decision" on his claim for benefits "after a hearing." The Court held in *Salfi* that the "final decision" requirement is a "statutorily specified jurisdictional prerequisite" (422 U.S. at 766). Accord, *Ringer*, slip op. 14. The Court further held in *Salfi* that the meaning of the term "final decision" in 42 U.S.C. 405(g) "is left to the Secretary to flesh out by regulation" and that she may "specify such requirements for exhaustion as [s]he deems serve [her] own interests in effective and efficient administration" (422 U.S. at 766 & n.9).

"Pursuant to her rulemaking authority [under 42 U.S.C. 405(a)], the Secretary has provided that a 'final decision' is rendered on a claim * * * only after the individual claimant has pressed his claim through all designated levels of administrative review" (*Ringer*, slip op. 2 (footnote omitted); see also *Salfi*, 422 U.S. at 765)—*i.e.*, only after the Appeals Council has either rendered a decision or denied the claimant's request for review. 20 C.F.R. 404.900(a)(5), 404.981, 416.1400(a)(5), 416.1481. This requirement has been embodied in the governing

regulations since 42 U.S.C. 405(g) was enacted,[5] including those in effect when Congress enacted the Title II disability program in 1954 and 1956[6] and the SSI program in 1972. Congress's provision in 42 U.S.C. 421(d) and 42 U.S.C. 1383(c)(3) for a disability or SSI claimant to obtain judicial review "as is provided in section 405(g)" thus constitutes a ratification of that established exhaustion requirement and an expression of congressional intent that it should apply with full force under the disability and SSI programs. See *Haig* v. *Agee*, 453 U.S. 280, 297-299 (1981); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

The Secretary has adopted only one exception to the requirement of full exhaustion. She has promulgated regulations under which she will stipulate that the decision at the reconsideration level constitutes her "final decision" on a particular claim where all other issues have been resolved and the only obstacle to payment is a statutory provision that the claimant contends is unconstitutional. 20 C.F.R. 404.923-404.928, 416.1423-416.1428. See *Ringer*, slip op. 2-3 n.2.[7] This exception has no application here. Nor did the district court or the court of appeals suggest that the Secretary had in any other manner designated what would otherwise be "interlocutory denials" (*Mathews* v. *Diaz*, 426 U.S. at 73) by the state agency or ALJs as her "final decisions" on the class members' claims. See App., *infra*, 13a. The district court therefore had no authority to include within the class

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[5] 5 Fed. Reg. 4169, 4171-4174 (1940), adopting 20 C.F.R. 403.706(c), 403.708(g), 403.709(*l*), 403.710(e) (1941). See S. Doc. 10, 77th Cong., 1st Sess. Pt. 3, at 38-39, 51-53 (1941).

[6] See 20 C.F.R. 403.706(c), 403.708(b), 403.708(g), 403.709(b), 403.709(*l*), 403.710(b), 403.710(e) (1954 & 1956); 20 C.F.R. 404.908, 404.911, 404.916, 404.918, 404.940, 404.946, 404.951 (1972).

[7] This single exception to the exhaustion requirement is discussed in our jurisdictional statement (at 6-7, 19-21) in *Heckler* v. *Owens*, No. 84-1905, which presents the question of the constitutionality of a provision of the Social Security Act and in which the named plaintiffs pursued the expedited appeal process.

those individuals who had not exahusted their remedies through the Appeals Council stage.

b. The court of appeals nevertheless held that the exhaustion requirement could be "waived" by the district court in this case (App., *infra*, 12a-15a). The court's misuse of terminology is emblematic of its treatment of the jurisdictional prerequisite of a "final decision" and its intrusion into matters reserved to the Secretary. A court cannot "waive" the application of a procedural provision that is designed to protect the interests of a party. Only the party himself can do that. The exhaustion requirement protects the interests of the Secretary, on behalf of the public, in the effective and efficient administration of the Social Security Act. It does so by allowing SSA "an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, * * * to compile a record which is adequate for judicial review," and to ensure that "the claim is neither otherwise invalid nor cognizable under a different section of the Act " (*Salfi*, 422 U.S. at 765). A court has no authority to "waive" that protection based on its own de novo weighing of these or other factors that it deems relevant.

The circumstances of this case amply demonstrate why a court is ill-equipped to make that determination. The Commissioner of Social Security already had taken steps to correct the apparent error by SSA personnel before this suit was even filed, thereby making judicial intervention unnecessary. Furthermore, the memoranda from SSA personnel to state agency officials reflecting the interpretation of the regulations that respondents challenge concededly were not binding upon the ALJs or the Appeals Council. As a result, even if the Commissioner had not taken corrective measures, individual claimants who received an adverse decision from the state agency were not prevented from obtaining a full consideration of their RFC or a favorable decision on the merits from an ALJ or the Appeals Council. Compare *Ringer*, slip op. 15. Thus, it would be especially inappropriate under

the disability programs to dispense with the exhaustion requirement after the claimant has received an adverse initial determination or reconsideration decision. Those determinations are made by the state agencies, not by SSA itself. It is not until the ALJ hearing stage that the Secretary, through adjudicators in SSA, has an opportunity as a matter of course to apply her experience and expertise and correct errors.

Indeed, the cases of the named plaintiffs indicate that many individual class members, if they had pursued administrative appeals to the ALJ stage, would have been found either disabled or not disabled on grounds other than those relating to the interpretation of the particular regulation pertaining to RFC. According to the allegations in the amended complaint, two of the eight named plaintiffs were found disabled by an ALJ because their impairments met the listings at step three of the sequential evaluation process, a ground unrelated to the manner in which RFC should be assessed (C.A. App. 61 (Jane Doe II), 65 (Richard Roe IV)).[8] By the same token, two other named plaintiffs were denied benefits because their impairments were found by the ALJ at step two of the sequential evaluation process to be "nonsevere," a ground unrelated to an individualized consideration of RFC (C.A. App. 61-62 (Jane Doe III), 63 (Richard Roe II)). Another plaintiff also was denied benefits because he was found by the ALJ to have the RFC to do his own past work, which likewise did not directly implicate the alleged "presumption" of ability to do unskilled work generally (C.A. App. 65-66 (Richard Roe V)).[9] Accordingly, ex-

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[8] A third plaintiff who had failed to pursue his administrative remedies beyond the reconsideration stage on his first application for benefits was found to be disabled after he filed a second application (C.A. App. 64 (Richard Roe III)).

[9] Moreover, these latter three claimants and Jane Doe I all had personally exhausted their administrative remedies through the Appeals Council stage and filed an individual action for judicial review under 42 U.S.C. 405(g) by the time the district court ruled

haustion was in no sense a futile or wasteful exercise here. Compare *Ringer*, slip op. 15-16 & n.12.

c. Where, as here, the Secretary has not waived exhaustion, this Court has identified only one situation in which a claimant may obtain judicial review without pursuing his administrative remedies to the Appeals Council stage. That exception was first recognized in *Mathews* v. *Eldridge*, 424 U.S. at 330, in which the claimant asserted a due process right under *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), to a hearing before his disability benefits were terminated. The Court relied on several factors in holding that the district court had jurisdiction under 42 U.S.C. 405(g) to decide that legal issue.

First, the Court observed that the asserted right to a pretermination hearing was "entirely collateral" to the merits of his substantive claim of entitlement. 424 U.S. at 330. Second, the Court explained that the assertion of a constitutional right to a pretermination hearing rests on the proposition that full relief cannot be obtained at a post-termination hearing, and that in light of *Goldberg* v. *Kelly*, *supra*, the claimant "ha[d] raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments." 424 U.S. at 331 (footnote omitted). Thus, the Court determined that, unlike in *Salfi*, the grant or denial of Eldridge's substantive claim for other reasons at a subsequent stage of the administrative process or on judicial review would not answer his constitutional challenge. 424 U.S. at 331-332. The Court concluded, in other words, that the assertion of a constitutional right to a hearing *before* benefits were

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in this case (C.A. App. 60, 62, 63, 66). The remaining named plaintiff was found by the ALJ to have an impairment that met the listings but was denied benefits under the nondisability provisions of the Act (C.A. App. 62 (Richard Roe I))—*i.e.*, for reasons unrelated to the alleged presumption concerning RFC. And although this plaintiff later reapplied for benefits, he failed to pursue his administrative remedies past the reconsideration stage (*ibid.*).

terminated would be effectively unreviewable (and any resulting constitutionally-based injury would be effectively irremediable) on judicial review of the Secretary's final decision on the merits of the claim for benefits, which would occur only *after* benefits had been terminated. Compare *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). See also *Ringer*, slip op. 14-15.

This exception plainly has no application here. As the court of appeals acknowledged (App., *infra*, 14a), the legal issues respondents raise concerning the interpretation of regulations affecting the assessment of RFC are not "entirely" or "wholly" collateral to their substantive claims for benefits, as *Ringer* and *Eldridge* require. To the contrary, those regulations give content to the statutory definition of "disability" and therefore relate directly to the class members' substantive entitlement to benefits. Moreover, the alleged failure by the state agency to make an individualized assessment of a particular class member's RFC would be fully reviewable on judicial review of the Secretary's final decision denying benefits (assuming that the ALJ and Appeals Council likewise failed to make such an assessment): the court could reverse that decision and remand with instructions to make an appropriate assessment of RFC and to award retroactive benefits if the claimant were found to be disabled.

The court of appeals believed that *Eldridge* supported its holding because class members might suffer a "severe medical setback" if they had to pursue administrative remedies and thus, like the plaintiff in *Eldridge*, they had made a "colorable claim" that retroactive benefits would not fully compensate them (App., *infra*, 13a-14a). The court misunderstood the holding in *Eldridge*. This Court did not hold that any disability claimant could bypass the carefully structured administrative appeals process merely by making a "colorable" showing to a court that he might suffer hardship by virtue of an interlocutory denial of his claim on the merits. The Court was referring to the *distinct* injury of *constitutional* dimension that would

have resulted if Eldridge's benefits were terminated without the prior hearing that he alleged was required by the Due Process Clause; the Court simply observed, citing *Goldberg* v. *Kelly*, *supra*, that Eldridge had made a "colorable" claim of such a distinct injury, tied directly to his collateral constitutional assertion, that would not be remedied by a reversal on the merits and a retroactive award of benefits.

By contrast, the very premise of the multi-level administrative review process established by Congress and the Secretary is that if an individual's claim is erroneously denied on the merits at an early stage of the administrative process, a reversal at a later stage or on judicial review and the resulting award of the accrued benefits to which he is entitled *is* an adequate remedy for any statutory error. *Ringer*, slip op. 14-15. "Congress must have felt that cases of individual hardship resulting from delays in the administrative process had to be balanced against the potential for overly casual or premature judicial intervention in an administrative system that processes literally millions of claims every year. If the balance is to be struck anew, the decision must come from Congress," not the courts. *Id.* at 23-24 (footnote omitted). Moreover, where Congress has believed that claimants might experience hardship by virtue of the exhaustion requirement, it has addressed that problem directly by providing for the continuation of benefits until after the ALJ hearing. See pages 5-6, *supra*. Congress has not dispensed with the exhaustion requirement itself, as the court of appeals did in this case.

d. For the foregoing reasons, there is no support whatever in the "final decision" language of 42 U.S.C. 405(g), in implementing regulations, or in this Court's decisions for the court of appeals' holding that it may dispense with the exhaustion requirement based on its own balancing of such factors as whether exhaustion regarding a particular legal issue would be "futile"; whether the legal issue can be characterized as "procedural" or "substantially" collateral; and whether a "colorable" showing

has been made that the claimant (or some unspecified number of the members of a class of claimants) might not be fully compensated by a retroactive award of benefits. This largely standardless approach would sacrifice the certainty and ease of application that are critical to the efficient administration of the Social Security Act and to the ability of the lower federal courts to dispose promptly of thousands of individual Social Security cases and numerous class actions annually without extensive and wasteful litigation on threshold questions of jurisdiction.

The court of appeals' exhaustion analysis in this case was recently followed by the Eighth Circuit in *Polaski* v. *Heckler*, 751 F.2d 943, 951-955 (1984). See also *Reed* v. *Heckler*, 756 F.2d 779 (10th Cir. 1985). However, *Polaski* and the instant case squarely conflict on the exhaustion issue with *Hyatt* v. *Heckler*, 757 F.2d 1455, 1460 (1985), in which the Fourth Circuit held that a court could excuse exhaustion only where the legal issue involved is "wholly collateral" to the claim for benefits. That conflict—on a broadly recurring issue raised in what HHS informs us are approximately 60 pending class actions arising under the Social Security disability programs—plainly warrants resolution by this Court.

2. a. The district court, affirmed by the court of appeals, also included in the class any individual who received an adverse determination by the New York state agency on or after April 1, 1980, almost three years before this suit was filed in February 1983 (App., *infra*, 65a). This aspect of the class certification is inconsistent with the requirement in 42 U.S.C. 405(g) that judicial review of the Secretary's "final decision" on an individual's claim for benefits must be sought "within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow."

The Secretary has promulgated regulations establishing a procedure for the exercise of her authority under 42

U.S.C. 405(g) to extend the 60-day filing period. Under those regulations, the claimant must file a written request with SSA explaining why he did not seek judicial review within 60 days. SSA then will extend the filing time if it determines that the claimant has established "good cause" for missing the deadline. 20 C.F.R. 404.982, 404.911, 416.1482, 416.1411. There is no indication that any of the class members who received a final decision of the Secretary more than 60 days before this suit was filed ever submitted a request to the Secretary under these provisions. Those class members therefore remain time-barred, and they were not properly included in the class.

b. The court of appeals concluded, however, that a court may extend the 60-day filing period even where the Secretary has not done so, and that in this case the running of that period should be "effectively tolled" on a state-wide basis during the time that the challenged "presumption" concerning RFC was operative but undisclosed (App., *infra*, 17a-18a). This holding is plainly wrong.

" '[T]he United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.' " *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981), quoting *United States* v. *Testan*, 424 U.S. 392, 399 (1976), and *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). Consistent with these principles, the Court held in *Salfi* that the "final decision" requirement in 42 U.S.C. 405(g) is a "statutorily specified jurisdictional prerequisite" to suit. 422 U.S. at 766. See also *Ringer*, slip op. 14. The requirement in 42 U.S.C. 405(g) that an action for judicial review be commenced within 60 days of "such decision" (or within such further time as the Secretary may allow) appears in the same sentence as the final decision requirement, and it likewise is a "statutorily specified jurisdictional prerequisite" to suit. *Hunt* v. *Schweiker*, 685 F.2d 121, 123 (4th Cir. 1982). A court has no authority to entertain an action by (or on behalf of) any individual

who has not satisfied that prerequisite. *Heckler* v. *Lopez*, No. A-145 (Oct. 11, 1983), slip op. 3 (Stevens, J., dissenting in part). As Justice Stevens has explained (*ibid.*):

> These persons' right to seek administrative or judicial review of their * * * decisions had expired, and they could obtain benefits only by requesting that the Secretary reopen their cases. However, the District Court had no jurisdiction to review the Secretary's refusal to reopen the cases. *Califano* v. *Sanders*, 430 U.S. 99 (1977).

Compare *Munro* v. *United States*, 303 U.S. 36, 41 (1938); *Finn* v. *United States*, 123 U.S. 227, 232-233 (1887).[10]

The court of appeals' holding also is wrong even if the 60-day filing requirement is not regarded as jurisdictional in the strictest sense. However they may be characterized, statutorily mandated limits on the time within which a suit may be brought against the federal government must be strictly construed, and the courts are not authorized to fashion their own tolling rules or to extend those time limits beyond what Congress has permitted. *Soriano* v. *United States*, 352 U.S. 270, 275-276 (1957);

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[10] In *Salfi* and *Eldridge*, the Court described the 60-day filing period as a "statute of limitations" that was waived by the Secretary because it was not timely raised below. 422 U.S. at 764; 424 U.S. at 328 n.9. However, as we explain in our jurisdictional statement (at 24 n.11) in *Heckler* v. *Owens*, *supra*, those statements were dicta, since the 60-day issue was not raised in either case and the claimant in each sought judicial review within 60 days of the relevant administrative decision. By contrast, this Court's decisions in *Munro* and *Finn*, cited in the text, indicate that such a time limit on filing suit against the government is not subject to waiver rules applicable to ordinary statutes of limitations. In any event, in her answer in this case, the Secretary contended that the district court lacked jurisdiction over the subject matter (C.A. App. 53), which in the present context connotes a failure to comply with the requirements of 42 U.S.C. 405(g). Moreover, the 60-day issue was fully developed in the district court. Thus, contrary to the district court's apparent suggestion (App., *infra*, 59a), the Secretary cannot fairly be said to have "waived" any objection to that fundamental defect.

United States v. *Kubrick*, 444 U.S. 111, 117-118 (1979). Cf. *United States* v. *Boyle*, No. 83-1266 (Jan. 9, 1985), slip op. 7-8. In this case, the fact that Congress expressly vested authority in the *Secretary* to extend the 60-day filing period under 42 U.S.C. 405(g) in appropriate circumstances, but conferred no such authority on the courts, strongly reinforces the conclusion that the courts have no authority to excuse noncompliance with the 60-day requirement under duplicative, judicially fashioned tolling rules. Cf. *United States* v. *Locke*, No. 83-1394 (Apr. 1, 1985), slip op. 9 n.10.

c. The particular way in which the court of appeals sought to avoid application of the 60-day rule in this case is especially objectionable, even if a court in some circumstances could excuse a claimant from complying with that requirement. The court believed that the running of the 60-day period should be tolled while what it labeled the "secretive" presumption regarding RFC was in effect but undisclosed (App., *infra*, 18a). The apparent premise of this holding—that there was some sort of sinister practices involved—is mistaken. There is no indication that the memoranda upon which the district court relied (*id.* at 41a) were anything other than ordinary communications in the normal course of agency business concerning an issue on which the personnel involved were attempting in good faith to develop and articulate a policy. Nothing about them indicates they were intended to be "secretive." To the contrary, an agency of the State of New York, one of the plaintiffs in this case, made the RFC determinations at the initial determination and reconsideration stages, and it concededly had full knowledge of the interpretation reflected in those memoranda. However erroneous that interpretation may appear in hindsight, the documents purported to interpret and apply the governing regulations and implementing forms and instructions, not to establish a secret regime in deliberate contravention of those materials. Similarly, SSA quality reviews of state agency decisions, upon which the district court also relied

(*id.* at 34a-36a, 39a-40a), are a regular part of SSA's responsibility that have been mandated by Congress, and the state agency of course was fully aware of that practice as well. See page 4, *supra*.

The court of appeals' analysis was also seriously flawed as a legal matter. The court relied on a parallel it drew to when a cause of action "accrues" under the two-year limitations provision in the Federal Tort Claims Act (28 U.S.C. 2401(b). See App., *infra*, 18a, citing *Barrett* v. *United States*, 689 F.2d 324, 327-330 (2d Cir. 1982) (a FTCA case). But contrary to the court's belief, FTCA principles do not support its holding. This Court held in *United States* v. *Kubrick*, 444 U.S. 111 (1979), that a claim "accrues" under the FTCA when the plaintiff has discovered both his injury and its probable cause. Here, when each class member received notice of an administrative decision denying his claim, he clearly knew of his "injury" (the denial of statutory benefits), its "cause" (the adverse decision), and who caused it (the Secretary, acting through SSA or the state agency). Under FTCA principles, the 60-day period would clearly begin to run at that point even if the claimant did not also know that SSA had given an erroneous interpretation of the regulations to state agency officials. *Kubrick*, 444 U.S. at 121-122.

The more fundamental response to the court of appeals' reasoning, however, is that this case does not arise under the FTCA and does not require a court to ascertain when a cause of action "accrues" for purposes of that Act. In 42 U.S.C. 405(g), Congress *specified* when a cause of action accrues: when notice of the "final decision" of the Secretary is mailed to the claimant. Congress further specified that judicial review must be sought within 60 days of that date unless the Secretary extends the time, and indeed the notice of "final decision" informs the claimant of his right to seek judicial review within 60 days. Compare *Atkins* v. *Parker*, No. 83-1660 (June 4, 1985), slip op. 12, 15. The court below was not free to

refashion the statutory scheme by designating different operative dates.

The court of appeals' approach also would present enormous practical difficulties. It apparently would have the effect of tolling the running of the 60-day period, on a statewide or even nationwide basis, whenever an administrative decision adverse to a claimant was based on an erroneous interpretation of the statute or regulations that was contained in internal operating instructions. Such implementing instructions, which are not required to be published in the *Federal Register*, are commonplace in the administration of the Social Security Act. To dispense with the filing requirement on the basis the court suggested therefore would broadly unsettle the repose that Congress intended to result from the 60-day rule.

d. The court of appeals also held that even if the district court did not have jurisdiction under 42 U.S.C. 405(g) to review the "final decisions" of class members that were rendered more than 60 days before this suit was filed, it could review those same decisions under the mandamus statute, 28 U.S.C. 1361 (App., *infra*, 19a-20a). The court conceded (*id.* at 20a-21a n.7) that under this Court's decision in *Ringer*, slip op. 12-13, the exhaustion requirement embodied in the "final decision" language of 42 U.S.C. 405(g) could not be circumvented by resort to mandamus jurisdiction. It necessarily follows that the 60-day filing period cannot be avoided in that manner either.

The second sentence of 42 U.S.C. 405(h) provides that "[n]o findings of fact or decision of the Secretary shall be reviewed by any * * * tribunal * * * except as herein provided"—*i.e.*, except as provided in 42 U.S.C. 405(g), subject to that section's 60-day time limit. Section 405(h) thus forecloses the very circumvention of the 60-day rule that the court of appeals has allowed. In any event, mandamus is not available where there is another adequate remedy or where the defendant does not owe the plaintiff a clear nondiscretionary duty. *Ringer*, slip op. 13.

Here, the class members involved had a fully adequate remedy under 42 U.S.C. 405(g); they simply failed to invoke it in a timely fashion. *Ringer*, slip op. 13. Furthermore, the Secretary's determination whether a particular individual has the RFC to do unskilled work is itself a discretionary decision (*ibid.*) and, in addition, the Secretary clearly has no mandatory duty to reopen the binding administrative decisions of time-barred class members in order to reevaluate each member's RFC. *Califano* v. *Sanders*, *supra*.

e. In contrast to the Second Circuit in this case, the Fourth and Sixth Circuits have held that the 60-day filing period in 42 U.S.C. 405(g) is jurisdictional. See *Hyatt* v. *Heckler*, 757 F.2d 1460-1461; *Hunt* v. *Schweiker*, *supra*; *Biron* v. *Harris*, 668 F.2d 259, 261 (6th Cir. 1982); *Whipp* v. *Weinberger*, 505 F.2d 800, 801 (6th Cir. 1974). Other courts of appeals, however, have reached a contrary conclusion. See *Mental Health Ass'n* v. *Heckler*, 720 F.2d at 973 n.19; *Hatchell* v. *Heckler*, 708 F.2d 578, 580 n.1 (11th Cir. 1983). The court of appeals in this case acknowledged that there is a circuit conflict on this issue (App., *infra*, 17a) and that this Court's "position on whether the 60-day provision is jurisdictional is not free from doubt" (*id.* at 16a). This conflict warrants resolution by this Court, especially in view of its broad practical ramifications.

3. The court of appeals also ignored the fact that Congress has specifically addressed the very questions respondents have raised in this suit and has fashioned its own remedial measures for persons who may have been erroneously denied benefits under prior standards pertaining to evaluation of mental impairments. Congress directed the Secretary in Section 5(a) of the Social Security Disability Benefits Reform Act of 1984 to develop new standards for evaluating mentally impaired claimants. 98 Stat. 1801; App., *infra*, 73a-75a. Proposed standards have been issued (50 Fed. Reg. 4948 (1985)), and we have been informed by HHS that final regulations may

be promulgated in June 1985. Congress provided that any person who claimed a disability based on mental impairment and was found not to be disabled on or after March 1, 1981 could reapply and be reevaluated under these new standards. § 5(c)(3), 98 Stat. 1802. The court of appeals, by contrast, required reopening of cases back to April 1, 1980. Moreover, unlike the court of appeals, Congress did not provide that the Secretary must reopen *all* past decisions, whether or not the claimant so requests. Nor did Congress provide that any claimant who reapplied and was found disabled would be entitled to full retroactive benefits, as the court of appeals ordered. Under the special reopening provision of the 1984 Act, persons who are found on reapplication to be disabled are entitled to benefits only for the 12 months prior to the date of their new applications. Finally, Congress did not waive the exhaustion and 60-day requirements for persons who are members of class actions raising mental impairment issues in court, as it did under Section 2 of the 1984 Act (98 Stat. 1794) with regard to cases relating to the medical improvement issue. See *Heckler* v. *Lopez*, No. 84-115 (Dec. 10, 1984); *Heckler* v. *Kuehner*, No. 83-1593 (Nov. 5, 1984).

Thus, the decision of the court of appeals fails to respect the judgment of Congress not only with regard to the exhaustion and 60-day requirements in 42 U.S.C. 405(g), but also with regard to the determinations in the 1984 Act to adhere to those requirements and to provide more limited relief for persons claiming benefits on the basis of a mental impairment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1095—August Term, 1983

Docket No. 84-6037

CITY OF NEW YORK, NEW YORK CITY HEALTH AND HOSPITALS CORP., STATE OF NEW YORK, CESAR PERALES, COMMISSIONER, N.Y.S. DEPT. OF SOCIAL SERVICES, WILLIAM F. MORRIS, ACTING COMMISSIONER, N.Y.S. OFFICE OF MENTAL HEALTH, JANE DOES I AND II, RICHARD DOES I, II, III & IV, PLAINTIFFS APPELLEES

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, JOHN A. SVAHN, COMMISSIONER OF U.S. SOCIAL SECURITY ADMINISTRATION, DEFENDANTS-APPELLANTS

Argued: March 23, 1984 Decided: August 27, 1984

Before:

LUMBARD, NEWMAN, and PRATT, *Circuit Judges.*

JON O. NEWMAN, *Circuit Judge:*

The Secretary of Health and Human Services appeals from a judgment of the District Court for the Eastern District of New York (Jack B. Weinstein, Chief Judge) invalidating a procedure used by the Social Security Administration ("SSA") in the determination of original and continuing eligibility of claimants for disability benefits. *City of New York v. Heckler*, 578 F. Supp. 1109 (E.D.N.Y. 1984). The ruling affects a class of persons with severe mental illnesses. The class is estimated to include more than 50,000 New York residents. The Secretary raises no challenge on appeal to the District Court's invalidation of the challenged procedure, which has since been abandoned. However, the appeal presents substantial and complicated issues concerning the jurisdiction of the District Court to adjudicate the class members' challenge and to award relief. For reasons that follow, we affirm the judgment of the District Court.

Background

The invalidated procedure concerns one aspect of the elaborate process by which people are determined to be eligible for disability benefits under the Social Security Disability Insurance ("DI") program, established by Title II of the Social Security Act ("the Act"), 49 Stat. 622, as amended, 42 U.S.C. § 401 *et seq.* (1982), and the Supplemental Security Income ("SSI") program established by Title XVI of the Act, 76 Stat. 197, as amended, 42 U.S.C. § 1381 (1982). More specifically, we are concerned with the five-step "sequential evaluation" process adopted by the Secretary to govern determination of initial and continuing eligibility for disability benefits under both DI and SSI programs.

The first step in the sequential process is a decision whether the claimant is engaged in "substantial gainful activity." If so, benefits are denied. 20 C.F.R. §§ 404.1520(a), (b), 416.920(a), (b) (1983). If not, the second step is a decision whether the claimant's medical condition or impairment is "severe." If not, benefits are denied. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the impairment is "severe," the third step is a decision whether the claimant's impairments meet or equal the "Listing of Impairments" set forth in subpart P, app. 1, of the social security regulations, 20 C.F.R. §§ 404.1520(d), 416.920(d). These are impairments acknowledged by the Secretary to be of sufficient severity to preclude gainful employment. If a claimant's condition meets or equals the "listed" impairments, he or she is conclusively presumed to be disabled and entitled to benefits. If the claimant's impairments do not satisfy the "Listing of Impairments," the fourth step is assessment of the individual's "residual functional capacity," *i.e.*, his capacity to engage in basic work activities, and a decision whether the claimant's residual functional capacity permits him to engage in his prior work. If the residual functional capacity is consistent with prior employment, benefits are denied. 20 C.F.R. §§ 404.1520(e), 416.920(e). If not, the fifth and final step is a decision whether a claimant, in light of his residual functional capacity, age, education, and work experience, has the capacity to perform "alternative occupations available in the national economy." *Decker v. Harris*, 647 F.2d 291, 298 (2d Cir. 1981); 20 C.F.R. §§ 404.1520(f), 416.920(f). If not, benefits are awarded.

The procedural irregularity challenged in this litigation concerns the fourth step of the sequential eval-

uation process—the determination of residual functional capacity. In disregard of the regulatory requirement to conduct an individualized assessment of the residual functional capacity of each claimant, SSA, informally and without public disclosure, adopted an administrative practice that effectively imposed a presumption upon the determination of eligibility for DI benefits: Claimants whose mental impairments were not as severe as those in the Listing of Impairments were presumed to retain a residual functional capacity sufficient to perform at least unskilled work.[1] This presumption was conclusive as to most claimants with mental impairments that were "severe" but not "listed." The practical effect of the presumption was to end the sequential process for most class members at the third step. The only class members who might progress through the fourth and fifth steps and receive benefits were those over 50 with extreme vocational deficiencies and "severe" but unlisted mental impairments. These class members, despite the presumption concerning residual functional capacity, might be found eligible for benefits by virtue of the medical-vocational "grid" regulation,

[1] SSA's policy was communicated through a series of unpublished internal memoranda circulated within SSA from 1979 through 1982. It was enforced on the state disability determination agency through SSA's "Quality Assurance Review" of initial state determinations. At both the regional and national levels SSA analysts and physicians conduct sample reviews of state agency decisions. Whenever regional or national review detects an "error," the claim is remanded to the state agency for redetermination. According to the evidence presented to the District Court, for the period in question SSA quality assurance reviews, and consequently the state agency whose performance SSA scrutinized, were guided by the challenged presumption.

20 C.F.R. subpart P, app. 2 (1983), but the force of the presumption could still adversely affect their claims.[2]

The presumption concerning residual functional capacity was applied throughout the elaborate administrative process by which claims for initial and continuing disability benefits are determined. The presumption guided determinations made by the New York State Office of Disability Determinations, pursuant to its contract with the SSA and review decisions made at the regional and national levels by SSA officials. Upon the *de novo* reviews conducted by administrative law judges, the presumption was not required to be applied, but the District Court found that ALJ's often relied on determinations of residual functional capacity that were tainted by use of the presumption earlier in the review process.

On February 8, 1983, the City of New York and the New York City Health and Hospitals Corporation, the Commissioner of the New York State Department of Social Services, and the Acting Commissioner of the New York State Office of Mental Health, suing on their own behalf and as *parens patriae*, and eight named individuals brought this class action against the Secretary and the Commissioner of SSA on behalf of

[2] The differing consequences of the presumption for the minority and majority of class members become evident from a comparison of the "grid" regulations concerning older and younger persons. *Compare* 20 C.F.R. subpart P, app. 2, §§ 201.01, 201.09, 202.01, 202.09, 203.01, 203.10 (1983) (unskilled claimants aged 50 and over granted benefits), *with* 20 C.F.R. subpart P, app. 2, §§ 201.18, 201.23-24, 202.16-.17, 203.25 (1983) (unskilled claimants aged 49 and under denied benefits).

> All individuals residing in the State of New York who have applied for or received Title II and/or Title XVI benefits on or after April 1, 1980, and who have been found by defendants to have a mental impairment which is severe . . . and whose applications for benefits have been or will be denied or whose benefits have been or will be terminated, on the basis of defendants' determination that such persons are capable of substantial gainful activity.

Plaintiffs sought declaratory and injunctive relief enjoining the Secretary from continuing to apply the unwritten presumption concerning residual functional capacity. The complaint invoked jurisdiction under the Social Security Act, 42 U.S.C. § 405(g) (1982), and the mandamus statute, 28 U.S.C. § 1361 (1982).[3]

The Secretary unsuccessfully resisted class certification on the ground that the District Court lacked jurisdiction over most members of the proposed class. Following class certification, the Secretary filed her answer, denying plaintiffs' allegations and renewing

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[3] Federal question jurisdiction, 28 U.S.C. § 1331 (1982), was also invoked for causes of action based on the rule-making provision of the Administrative Procedure Act, 5 U.S.C. § 553 (1982), the Freedom of Information Act, 5 U.S.C. § 552 (1982), and the Due Process Clause of the Constitution. In view of our disposition of the appeal, we do not reach the question of whether jurisdiction is available on these alternative bases. Furthermore, since the Secretary does not challenge the standing of the individual and class plaintiffs, we do not reach the issue whether the City and State of New York have standing to assert their own interests or, acting as *parens patriae*, to protect the interests of their citizens. *Cf. Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 160 (1981) (inconsequential standing issues reserved).

her jurisdictional arguments. The answer did not specifically assert that the claims of some class members were time-barred by the 60-day rule of section 405 (g), which permits judicial review only of decisions of the Secretary made within 60 days of the filing of a complaint in a district court. Though the answer was not amended to assert a time bar, the Secretary referred to this argument at the outset of trial and in her post-trial brief.

The District Court rejected the Secretary's jurisdictional contentions. On the merits Chief Judge Weinstein ruled that "from 1978 until at least the early months of 1983" SSA engaged in a covert policy to deny class members an individualized assessment of each claimant's capacity to engage in substantial gainful activity in violation of the strictures of the Social Security Act and regulations enacted thereunder. 578 F. Supp. at 1115. As relief the Court ordered the Secretary (i) to reopen all disability determinations rendered after April 1, 1980, in which disability benefits were denied or terminated, and (ii) to "reinstate benefits of all class members until the claimant's eligibility is properly determined." *Id.* at 1125. These reinstated benefits have been referred to in the litigation as "interim" benefits. The Court stayed its judgment for ten days to permit an application for a stay pending appeal to this Court. *Id.*

Following the Secretary's motion for a stay pending appeal or, in the alternative, for clarification of the rationale for denying a stay, Chief Judge Weinstein entered an amended judgment modifying the judgment to limit relief to individuals with a "functional psychotic or functional non-psychotic mental impairment which is severe . . ." and to limit in-

terim benefits to recipients whose benefits had been terminated. The Court also entered a two-part stay pending appeal: First, the amended judgment was fully stayed for a ten-day period to permit application to the Court of Appeals for a stay pending appeal; second, a partial stay pending appeal was granted relieving the Secretary of the obligation to reopen and readjudicate the claims of individuals whose applications for benefits had been denied and who had abandoned their claims prior to December 10, 1982 (the 60th day prior to the filing of this action). Reopening was still required for all class members whose benefits had been terminated. The Secretary was also required to identify *all* class members, those whose applications for benefits had been denied and those whose benefits had been terminated, and to provide interim benefits to all class members whose benefits had been terminated. This Court denied the Secretary's motion to stay the District Court's amended judgment.

On appeal, the Secretary does not challenge the District Court's ruling on the merits, but raises only jurisdictional contentions. She asserts that the District Court lacked jurisdiction under section 405(g) over most members of the certified class: (i) claimants whose right to pursue administrative or judicial review lapsed prior to December 10, 1982, (ii) claimants whose benefits were terminated and who did not challenge the Secretary's action, and (iii) claimants who failed to exhaust administrative remedies. The Secretary further contends that mandamus jurisdiction is not available and that the District Court lacked authority to award interim benefits in the absence of an administrative finding of disability.

Discussion

A. Section 405(g) Jurisdiction

Section 405(g) provides:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow . . . in the district court of the United States for the judicial district in which the plaintiff resides . . . .

The Secretary contends that many, if not most, class members fail to satisfy section 405(g)'s prerequisites of a final decision made after a hearing and commencement of a civil action within sixty days subsequent to the mailing of notice of such decision (or such further time as the Secretary may allow).

The requirement of a "final decision of the Secretary made after a hearing" has been held to consist of two elements—(i) the "jurisdictional," non-waivable requirement that a claim for benefits has been presented to the Secretary and (ii) the "waivable" requirement that the administrative remedies prescribed by the Secretary have been exhausted. *Mathews v. Eldridge*, 424 U.S. 319, 328-30 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 764-65 (1975).

Presentment Requirement. The District Court ruled that the non-waivable, "presentment" requirement had been satisfied by all class members—those whose applications for benefits had been denied by the Secretary and those whose benefits had been

terminated pursuant to continuing eligibility review. The class members whose applications for benefits were denied clearly satisfy the presentment requirement. *See Mathews v. Eldridge*, *supra*, 424 U.S. at 329; *see also Mathews v. Diaz*, 426 U.S. 67, 72, 76 (1976) (jurisdiction sustained for claimants who filed application after suit filed); *Jones v. Califano*, 576 F.2d 12, 18 (2d Cir. 1978) ("It is undisputed that [plaintiffs], by filing claims with the SSA, have satisfied the non-waivable requirement."). Whether recipients whose benefits were terminated also surmount this jurisdictional barrier is more problematic.

We reject at the outset the view endorsed by other Circuits that mere termination of benefits somehow satisfies the presentment requirement. *See Lopez v. Heckler*, 725 F.2d 1489, 1503 (9th Cir. 1984) ("class members . . . have had their benefits terminated . . . and have thus met the presentation requirement"); *Kuehner v. Schweiker*, 717 F.2d 813, 817 (3d Cir. 1983) (plaintiffs meet "the first, non-waivable condition, because all the claimants were benefit recipients whose benefits had been reduced or terminated"); *Ellison v. Califano*, 546 F.2d 1162, 1164 (5th Cir. 1977). We recognize that the rationale underlying these decisions is not implausible—that the recipient's failure to report that disability ceased amounts to a "continuing claim" for benefits.

We continue to adhere, however, to the position adopted in *Wheeler v. Heckler*, 719 F.2d 595, 600 (2d Cir. 1983), that a recipient subject to continuing eligibility review does not satisfy the presentment requirement through inaction. *Wheeler* held that terminated recipients who failed to "initiate[] even informal communications with SSA . . . either prior or subsequent to receipt of a termination notice," *id.* at 600 (footnote omitted), had not satisfied the non-waivable jurisdictional requirement of section 405(g). Various Supreme Court pronouncements lend support to this view. In *Eldridge*, a benefit-termination case, the Court found the presentment requirement satisfied by the recipient's actions that "specifically presented the claim that his benefits should not be terminated because he was still disabled." 424 U.S. at 329. *See also Califano v. Yamasaki*, 442 U.S. 682, 703-04 & n.15 (1979) (recipients must seek formal reconsideration in order to satisfy section 405(g)'s presentment requirement). Our view also draws support from some of the opinions written by the Justices in connection with the stay of the Ninth Circuit's decision in *Lopez v. Heckler*, *supra*. In granting the stay, Justice Rehnquist, acting as Circuit Justice, explicitly stated that the Secretary's termination decision does not by itself satisfy the presentment requirement. *Heckler v. Lopez*, 104 S. Ct. 10, 14 (1983). When the Court denied a motion to vacate the stay, Justice Stevens stated, in his partial concurrence, that the presentment requirement was satisfied by the submission of a questionnaire indicating that the recipient was still disabled and desired benefits, *Heckler v. Lopez*, 104 S. Ct. 221, 223 (1983) (Stevens, J., with whom Blackmun, J., joins, concurring in part and dissenting in part).

In this case, however, terminated recipients did not remain passive. Prior to the Secretary's decision to terminate benefits, every class member completed a Social Security questionnaire indicating in writing that he remained disabled and desired benefits. We agree with Chief Judge Weinstein that the submission of the disability questionnaire satisfied the presentment requirement.

The Secretary points out that the class members here apparently did not communicate with SSA after the submission of the questionnaire or the receipt of an initial termination notice. She seeks to distinguish *Eldridge* on the ground that the claimant there not only submitted a completed questionnaire but also sent a letter objecting to SSA's preliminary notice of termination of benefits. Her argument draws support from Justice Rehnquist's view that recipients must "question[] the initial determination that they cease to be disabled," *Heckler v. Lopez*, *supra*, 104 S. Ct. at 14. We agree that where the Secretary acts unilaterally to terminate or reduce benefits, for example, where benefits are terminated because a recipient returned to work or failed to cooperate with the agency's review process, a claimant must act in order to trigger section 405(g) jurisdiction. However, we resist the view that jurisdiction is lacking where a claimant asserts eligibility after commencement of the continuing eligibility review process even though prior to the Secretary's initial determination. We find more persuasive Justice Stevens' less formalistic, more pragmatic understanding of *Eldridge* that all a claimant need do is "specifically present[] the claim that his benefits should not be terminated because he was still disabled." *Heckler v. Lopez*, *supra*, 104 S. Ct. at 229 n.2 (quoting *Mathews v. Eldridge*, *supra*, 424 U.S. at 329). That thought was adequately expressed by Eldridge in either his letter or his returned questionnaire, and here by the plaintiffs' return of their questionnaires.

Exhaustion Requirement. The second jurisdictional prerequisite, that the administrative remedies prescribed by the Secretary be fully exhausted, may be waived, either by the Secretary, *Weinberger v. Salfi*,

supra, 422 U.S. at 766-67, or, in appropriate circumstances, by the courts, *Mathews v. Diaz*, *supra*, 426 U.S. at 76-77; *Mathews v. Eldridge*, *supra*, 424 U.S. at 330-32; *Mercer v. Birchman*, 700 F.2d 828, 831 (2d Cir. 1983). In this case the District Court, over the Secretary's objection, dispensed with the need fully to exhaust administrative remedies as a condition of judicial review. On appeal, the Secretary contends that judicial waiver is inappropriate in this case. We disagree.

The Supreme Court has adopted a practical approach to section 405(g)'s exhaustion requirement. The Court has approved judicial waiver where plaintiff's legal claims are collateral to the demand for benefits, where exhaustion would be futile, or where the harm suffered pending exhaustion would be irreparable. *Compare Mathews v. Eldridge*, *supra* (exhaustion waived), *with Heckler v. Ringer*, 104 S. Ct. 2013 (1984) (exhaustion not waived).

Although *Eldridge* and *Ringer* make clear the circumstances that permit a court to waive exhaustion, they do not establish whether each of the individual factors deemed relevant in those decisions—futility, collaterality, and irreparable harm—must be present before a court may dispense with exhaustion. In the absence of express guidance, we have taken the view that no one factor is critical. *See Smith v. Schweiker*, 709 F.2d 777, 780 (2d Cir. 1983). We have adopted a more general approach, balancing the competing considerations to arrive at a just result under the circumstances presented. That approach points toward waiver of exhaustion in this case.

As was true in *Eldridge* and not true in *Ringer*, claimants here have raised a colorable claim that recovery of retroactive benefits would not be fully

compensatory because of their mental disabilities and their dependency on disability benefits. We have no reason to disturb Chief Judge Weinstein's conclusion that the harm caused by wrongful denials was "irreparable." From ample evidence the District Judge found that "[t]he ordeal of having to go through the administrative appeal process" would likely trigger a "severe medical setback" for many members of the class. 578 F. Supp. at 1118. Such consequences are hardly consistent with the remedial goals of the Act and the nation's mental health policy.

With respect to the nature of the plaintiffs' claims, it cannot be said, as was true in *Eldridge*, that these are "wholly" collateral to the claim for benefits; plaintiffs' contention that the Secretary unlawfully failed individually to assess claimants' residual functional capacity is somewhat intertwined with claimants' demand for benefits. However, the class here complains fundamentally of a procedural irregularity and not of the Secretary's substantive standards of eligibility. The District Court was not asked to and did not rule on the merits of any of the underlying claims. In this regard cases such as *Heckler v. Lopez*, *supra*; *Heckler v. Ringer*, *supra*; and *Smith v. Schweiker*, *supra*, which involved challenges to the Secretary's substantive standards, are distinguishable. We conclude, therefore, that although not "wholly" collateral, plaintiffs' claims are substantially collateral to their entitlement to disability benefits and consequently present an appropriate circumstance for waiver. *See Mental Health Ass'n of Minnesota v. Heckler*, 720 F.2d 965, 969-71 (8th Cir. 1983); *see also Lopez v. Heckler*, *supra*, 725 F.2d at 1501-03; *Kuehner v. Schweiker*, *supra*, 717 F.2d at 818; *id.* at 821-23 (Becker, J., concurring).

Moreover, under the circumstances of this case, exhaustion of administrative remedies would have been futile. Although exhaustion might have resulted in recovery of retroactive benefits for some members of the class, as was also true in *Eldridge*, the administrative process cannot vindicate the procedural rights asserted in this litigation. The class members complain of a procedural irregularity—the failure of the Secretary to base eligibility determinations on individualized assessments of a claimant's residual functional capacity. This procedural right, guaranteed by the Secretary's regulations, cannot be vindicated by an ultimate determination of eligibility. For that reason further exhaustion justifiably may be waived.

More generally, we discern no legitimate interest to be advanced by requiring plaintiffs to travel through the administrative maze as a prerequisite of a judicial hearing. This is not a case like *Smith v. Schweiker*, *supra*, or *Heckler v. Ringer*, *supra*, where the claim asserted could benefit from further factual development or from the agency's "experience and expertise," *Weinberger v. Salfi*, *supra*, 422 U.S. at 765. Nor is this a case where exhaustion serves to "prevent[] premature interference with agency processes" or to allow the agency "an opportunity to correct its own error." *Id.* As in *Eldridge* it is not realistic to "expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient . . . in an adjudicatory context," 424 U.S. at 330.

Sixty-Day Limitation. Under the Act, claimant must seek judicial review of final decisions of the Secretary "within sixty days after the mailing . . . of notice of such decision or within such further time as the Secretary may allow." 42 U.S.C. § 405(g)

(1982). The Secretary argues that the District Court lacked jurisdiction over those claimants who were entitled to but did not seek judicial review of an adverse decision of the Secretary received more than 60 days prior to commencement of the present suit, *i.e.*, claimants who abandoned their claims prior to December 10, 1982.[4] She contends that the 60-day provision is jurisdictional and not a statute of limitations provision, as the District Court ruled. She further contends that the 60-day provision was not waived, and as a jurisdictional requirement, could not be waived.

We acknowledge that the Supreme Court's position on whether the 60-day provision is jurisdictional is not free from doubt. In the stay ruling in *Heckler v. Lopez*, *supra*, 104 S. Ct. at 222-23, Justice Stevens reckoned with the issue and concluded that the 60-day requirement is jurisdictional. Although the Secretary apparently had failed to raise the 60-day requirement in the District Court, Justice Stevens declined to find waiver and concurred in maintaining the stay of the Ninth Circuit's judgment insofar as the stay applied to claimants who had not sought administrative or judicial review of their termination decisions 60 days prior to the filing of the complaint.

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[4] At every stage in the administrative review process claimants are normally required to appeal from adverse administrative decisions within 60 days, *see* 20 C.F.R. §§ 404.900 *et seq.* and 416.1400 *et seq.* Consequently, the class members the Secretary considers time-barred are (1) claimants who did not seek administrative review within 60 days of the initial state agency determination of ineligibility, (2) claimants who sought an ALJ hearing but did not seek Appeals Council review within 60 days, and (3) claimants who appealed to the Appeals Council but failed to bring suit in federal district court within 60 days.

On various other occasions, however, the Court has instructed that the 60-day limitation is not jurisdictional. Both *Salfi* and *Eldridge* construed the 60-day requirement as a statute of limitations, waivable by the parties. *See Mathews v. Eldridge*, *supra*, 424 U.S. at 328 n.9; *Weinberger v. Salfi*, *supra*, 422 U.S. at 763-64. And notwithstanding his opinion in *Lopez*, Justice Stevens' separate opinion in *Heckler v. Ringer*, *supra*, 104 S. Ct. at 2028, 2033-36, incorporates the *Salfi* and *Eldridge* statements to the effect that section 405(g) contains a "statute of limitations" waivable by the parties. Justices Brennan and Marshall also view the 60-day requirement as waivable, *Heckler v. Lopez*, *supra*, 104 S. Ct. at 225, 226.

Along with other Courts of Appeals this Circuit has adopted the view that the 60-day limitation period is not jurisdictional. *Latona v. Schweiker*, 707 F.2d 79, 81 (2d Cir. 1983); *see Lopez v. Heckler*, *supra*, 725 F.2d at 1508; *Mental Health Ass'n of Minnesota v. Heckler*, *supra*, 720 F.2d at 973 n.19; *but see Lopez v. Heckler*, *supra*, 725 F.2d at 1510-11 (Boochever, J., concurring); *Whipp v. Weinberger*, 505 F.2d 800, 801 (6th Cir. 1974). In the absence of an authoritative ruling by the Supreme Court to the contrary, we continue to believe that the 60-day requirement is not jurisdictional.

That conclusion leads to the further inquiry whether the failure of some class members to satisfy the 60-day requirement is nonetheless fatal to their claims. Without assessing the correctness of Chief Judge Weinstein's view that the Secretary failed timely to assert the 60-day provision as a defense, we agree with the plaintiffs' contention that the 60-day requirement, even if timely raised, does not bar the claims of

any class members because the 60-day period was effectively tolled during the time that SSA's policy of applying the challenged presumption concerning residual functional capacity remained operative but undisclosed.

All of the class members who permitted their administrative or judicial remedies to expire were entitled to believe that their Government's determination of ineligibility was the considered judgment of an agency faithfully executing the laws of the United States. Though they knew of the denial or loss of benefits, they did not and could not know that those adverse decisions had been made on the basis of a systematic procedural irregularity that rendered them subject to court challenge. Where the Government's secretive conduct prevents plaintiffs from knowing of a violation of rights, statutes of limitations have been tolled until such time as plaintiffs had a reasonable opportunity to learn the facts concerning the cause of action. *See Lopez v. Heckler*, *supra*, 725 F.2d at 1505-07 (disability claim); *Barrett v. United States*, 689 F.2d 324, 327-30 (2d Cir. 1982) (claim under Federal Tort Claims Act), *cert. denied*, 103 S. Ct. 3111 (1983); *Chiappa v. Califano*, 480 F. Supp. 856 (S.D.N.Y. 1979) (disability claim). Since in this case the full extent of the Government's clandestine policy was uncovered only in the course of this litigation,[5] all class members may pursue this action notwithstanding the 60-day requirement.[6]

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[5] Although an earlier case, *Mental Health Ass'n of Minnesota v. Heckler*, *supra*, involved the identical SSA presumption at issue here, in that litigation SSA erroneously represented that the presumption was not in use in other SSA regions.

[6] Even if we were inclined to agree with the Secretary that the 60-day provision is jurisdictional, it would still be arguable that the time period was tolled by the non-disclosure of the presumption challenged in this litigation.

B. Mandamus Jurisdiction

Section 1361 of the Judicial Code provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

The Secretary resists mandamus jurisdiction with two arguments: (1) that the third sentence of section 405(h) of Title 42 bars mandamus jurisdiction and (2) that even if mandamus were available, the District Court erred in concluding that the writ could properly be issued. Neither argument succeeds.

Although the Supreme Court has on numerous occasions declined to decide whether the third sentence of section 405(h) bars mandamus jurisdiction over claims arising under the Act, *Heckler v. Ringer*, *supra*, 104 S. Ct. at 2022; *Califano v. Yamasaki*, *supra*, 442 U.S. at 698; *Norton v. Mathews*, 427 U.S. 524, 529-31 (1976); *Mathews v. Eldridge*, *supra*, 424 U.S. at 332 n.12, it is settled in this and other circuits that, notwithstanding the sweeping language of section 405(h), mandamus jurisdiction is available under circumstances where the writ properly would issue. *See, e.g., Dietsch v. Schweiker*, 700 F.2d 865, 867-68 (2d Cir. 1983); *Mercer v. Birchman*, *supra*, 700 F.2d at 832; *Ellis v. Blum*, 643 F.2d 68, 78-82 (2d Cir. 1981); *Barnett v. Califano*, 580 F.2d 28, 31 (2d Cir. 1978); *White v. Mathews*, 559 F.2d 852, 856 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *see also Lopez v. Heckler*, *supra*, 725 F.2d

at 1507-08; *Mental Health Ass'n of Minnesota v. Heckler*, *supra*, 720 F.2d at 968-69; *Kuehner v. Schweiker*, *supra*, 717 F.2d at 819; *Leschniok v. Heckler*, 713 F.2d 520, 522 (9th Cir. 1983).

This is a case where the writ properly would issue. A writ of mandamus will not issue unless (1) the plaintiffs have a right to have the act performed; (2) the defendant is under a clear nondiscretionary duty to perform the act requested; and (3) plaintiff has exhausted all other avenues of relief. The first two conditions are obviously satisfied. The Act and the regulations enacted thereunder establish both the right and the duty—claimants' right to have eligibility determinations based on individualized assessments of residual functional capacity and the Secretary's duty to make such assessments and base eligibility determinations upon them.

In a sense it is somewhat anomalous to uphold the exercise of mandamus jurisdiction in a case such as this where the District Judge concluded, and we agree, that all class members have an adequate remedy under section 405(g) of the Act. Normally, the availability of jurisdiction for traditional appellate review would preclude mandamus jurisdiction. Nevertheless, we rely on mandamus jurisdiction as an alternate source of the District Court's authority, in the event that, upon further review, it is determined that section 405(g) jurisdiction is unavailable to some of the class members.[7]

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[7] If the Supreme Court were to disagree with our rulings that class members are in compliance with the presentment and 60-day requirements of section 405(g), we believe mandamus jurisdiction would be available. However, we recognize that if section 405(g) jurisdiction should be held unavailable because of disagreement with our ruling that administrative remedies need not be exhausted, then mandamus jurisdiction would also be unavailable. *See Heckler v. Ringer*, *supra*, 104 S. Ct. at 2022-23; *Ellis v. Blum*, *supra*, 643 F.2d at 78.

C. The Merits and the Remedy

The Secretary has made no claim before the District Court or on appeal that use of the presumption concerning residual functional capacity was lawful. There is thus no dispute that on the merits the class members are entitled to prevail. However, the Secretary challenges on appeal the scope of the District Court's remedial decree, specifically, the reinstatement of benefits for those class members previously determined to be disabled but subsequently terminated from the disability rolls. This reinstatement has the effect of awarding interim benefits to terminated class members until such time as the SSA makes a procedurally correct determination that they are no longer eligible for disability benefits. In the Secretary's view, this award of interim benefits violates the principle of sovereign immunity, which shields the Government from liability for a money judgment in the absence of an express congressional enactment waiving such immunity. We disagree.

The Act authorizes benefit payments following a final decision by the Secretary or a final judgment by a court that a claimant is "entitled" to benefits, 42 U.S.C. § 405(i). The amended judgment provides interim benefits only to those individuals who have previously received a "final decision" from the Secretary that they were "entitled" to disability benefits. New applicants were not awarded interim benefits. Once the District Court properly invalidated the Secretary's termination decisions because of the acknowledged procedural illegality, the Court was clearly en-

titled to reinstate the earlier favorable final decisions pending lawful redeterminations of each claimant's continuing eligibility. As both the Eighth and Ninth Circuits have held in closely analogous circumstances, the payment of benefits to wrongfully terminated recipients follows a final decision of the Secretary and consequently is consistent with the requirements of section 405(i). *Mental Health Ass'n of Minnesota v. Heckler, supra*; *Lopez v. Heckler, supra* (preliminary injunction).

We do not construe the recent amendment to section 223 of the Act, P.L. No. 97-455, § 2, 96 Stat. 2498 (1983), codified at 42 U.S.C. § 423(g), extended through December 7, 1983, P.L. No. 98-118, § 2, 97 Stat. 803 (1983), as indicating a congressional understanding that federal courts lacked remedial power to order the award of interim benefits in appropriate circumstances. That amendment entitles claimants who are challenging a termination decision to continue to receive benefits throughout their administrative appeals. We see no reason to think that Congress, in authorizing interim benefits during administrative appeals, believed that such benefits were not available during pursuit of judicial remedies. The more plausible interpretation is that Congress was anxious to fill a gap and ensure continuity of benefits on the understanding that, after administrative remedies were pursued, courts had adequate authority to continue interim benefits.

More fundamentally, we do not construe section 405(i) as a limitation on a federal court's remedial powers under the Act. While a court's injunctive power must be exercised with caution, respectful of the authority of coordinate branches of Government, *cf. Heckler v. Day*, 104 S. Ct. 2249, 2258 (1984),

where, as here, the award of interim benefits is necessary to make whole individuals harmed by the SSA's failure to abide by the law, federal courts are not without authority to award the necessary relief. *See Mental Health Ass'n of Minnesota v. Heckler, supra*; *Day v. Schweiker*, 685 F.2d 19, 23-24 (2d Cir. 1982), *rev'd on other grounds sub nom. Heckler v. Day*, 104 S. Ct. 2249 (1984); *White v. Mathews, supra*, 559 F.2d at 861 (Social Security Act does not "exclud[e] the possibility of interim payments ordered by a court exercising its remedial power"), *cert. denied*, 435 U.S. 908 (1978).

The judgment of the District Court is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1095—August Term, 1983

Docket No. 84-6037

CITY OF NEW YORK, NEW YORK CITY HEALTH AND HOSPITALS CORP., STATE OF NEW YORK, CESAR PERALES, COMMISSIONER, N.Y.S. DEPT. OF SOCIAL SERVICES, WILLIAM F. MORRIS, ACTING COMMISSIONER, N.Y.S. OFFICE OF MENTAL HEALTH, JANE DOES I AND II, RICHARD DOES I, II, III & IV, PLAINTIFFS-APPELLEES

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, JOHN A. SVAHN, COMMISSIONER OF U.S. SOCIAL SECURITY ADMINISTRATION, DEFENDANTS-APPELLANTS

(On petition for rehearing
Decided: February 7, 1985)

Before:

LUMBARD, NEWMAN, and PRATT, *Circuit Judges.*

JON O. NEWMAN, *Circuit Judge*:

The Secretary of Health and Human Services has petitioned for rehearing of this panel's decision of August 27, 1984, affirming a judgment of the District Court that provided relief to a class of mentally ill persons in New York State who were unlawfully denied disability benefits either through rejection of their applications or termination of their prior disability status. 742 F.2d 729. The Secretary's initial petition reargued issues concerning the 60-day filing and exhaustion of remedies provisions of 42 U.S.C. § 405(g), which were the principal points raised on the main appeal; no dispute had been raised on the merits. We see nothing in the original petition that persuades us to alter our decision on those threshold issues.

On October 25, 1984, the Secretary supplemented her papers with additional arguments based upon the Social Security Disabilit Benefits Reform Act of 1984 ("Reform Act"), Pub. L. No. 98-460, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 1794, enacted on October 9, 1984. We afforded plaintiffs an opportunity to respond to the Secretary's supplemental papers. The Secretary presents two arguments based on the Reform Act, each of which we have concluded lacks merits.

The Secretary's first argument is essentially an invocation of the maxim *expressio unius.* As she notes, the Reform Act explicitly provides a limited exception to the normal requirements of section 405(g), which will permit unnamed members of certain class actions to pursue their challenges to the termination of their disability benefits. Reform Act § 2(d)(3). The exception to section 405(g) aids unnamed members of a class certified on or before September 19,

1984, in a class action challenging the termination of benefits on the ground that medical improvement has not been shown—what the Reform Act calls "a class action relating to medical improvement." Though acknowledging that the instant suit is not an "action relating to medical improvement," the Secretary argues that the Congressional decision to exempt this group of plaintiffs from the requirements of section 405(g) carries with it an implied refusal to permit any other plaintiffs to proceed without strict compliance with section 405(g). We disagree.

The Reform Act is remedial legislation, enacted principally to be of assistance to large numbers of persons whose disability benefits have been terminated. It would be a perverse view of Congressional intent if we were to infer from this beneficial legislation a determination on the part of Congress to deny other disability claimants the fruits of a judgment entered in their favor after a ruling that their claims had been unlawfully processed by the Secretary. What the Secretary is urging us to hold is that the Reform Act renders the finality and exhaustion requirements of section 405(g) more stringent than they were before the passage of the Act. We see no basis for reaching such a conclusion. In our view, those not specifically exempted by the Reform Act from the requirements of section 405(g) confront precisely the same threshold obstacles that section 405(g) created before the Reform Act was passed. On the initial argument of this appeal, the Secretary argued vigorously that those obstacles were insurmountable for the plaintiffs in this litigation. We disagreed for reasons set forth at length in our initial decision. In our view, the plaintiffs were entitled to prevail prior to enactment of the Reform Act, and they are not worse off after its passage.

The Secretary's second argument also proceeds from passage of the Reform Act. That Act requires that the cases of members of a class action relating to medical improvement shall be remanded to the Secretary. Reform Act § 2(d)(3). *See Heckler* v. *Kuehner*, 105 S. Ct. 376 (1984).[1] The Secretary points out that many members of the class in the instant litigation are also members of a class action relating to medical improvement, *Schisler* v. *Heckler*, Civ. No. CIV-80-572E (W.D.N.Y.) Any member of the class in the instant litigation whose disability benefits were terminated after the beginning date of the *Schisler* class, June 1, 1976, is also a member of the *Schisler* class. The Secretary contends that the disposition that Congress has directed for the members of the *Schisler* class must preclude relief in the instant case for members of this class who are also members of the *Schisler* class. We disagree.

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[1] In *Heckler* v. *Kuehner, supra*, the Supreme Court, acting upon supplemental papers submitted by the Solicitor General with respect to a petition for a writ of certiorari in a class action relating to medical improvement that had not produced a final judgment of the District Court in favor of the plaintiff class, summarily granted the writ, vacated the judgment of the Third Circuit, and remanded the case with directions to have the District Court remand the cases of the class members to the Secretary pursuant to the provisions of the Reform Act. The Supreme Court adopted the form of disposition order proposed by the Solicitor General with the notable exception that the final provision of the Court's order instructed the Third Circuit to instruct the District Court to "take other actions appropriate in light of [the Reform] Act," whereas the final provision of the Solicitor General's proposed order had directed dismissal of the complaint, a course the Supreme Court declined to follow. *Compare Heckler* v. *Kuehner, supra*, 105 S. Ct. at 376 (order of Supreme Court), *with id.*, Brief for the Petitioners in Reply to the Supplemental Brief for the Respondents at 8 (order proposed by Solicitor General).

As with the Secretary's first argument, we see no reason to believe that Congress, in enacting the Reform Act, intended to deny to any social security claimant in a case not raising medical improvement issues the benefits of a district court judgment rendered in his favor and affirmed on appeal. The Secretary makes no claim that the remedies available to members of the *Schisler* class by virtue of the Reform Act are inconsistent with the remedies available to members of the instant class by virtue of the judgment of the District Court, and we discern no inconsistency. In the Reform Act Congress specified a remedy for those raising the medical improvement issue. No member of the instant class is raising that issue in this lawsuit. The plaintiffs in this suit have secured a remedy for the wrong done to them by the unlawful procedure that was used in the processing of their claims. The Reform Act does not deny the members of the class in this litigation the remedy they have secured. If, in the course of providing members of the *Schisler* class the remedy to which they are entitled, it should develop that some aspect of that remedy is unnecessary for those who are members of both the *Schisler* class and the class in the instant litigation, the judgment in this case will not prevent the Secretary from applying to the District Court for the Western District of New York for appropriate adjustment of the remedy in the *Schisler* suit.

Finally, we note that section 5 of the Reform Act imposes a moratorium on continuing eligibility reviews for persons "determined to be under a disability by reason of a mental impairment" until revised criteria have been promulgated by the Secretary pursuant to the Act. The Secretary makes no claim

that section 5 modifies any provision of the judgment in this case. Whether section 5 will have an effect upon the administrative actions to be taken by the Secretary in implementing the judgment in this case is a matter to be determined in the first instance at the administrative level.

For these reasons, the petition for rehearing is denied.

APPENDIX C

UNITED STATES DISTRICT COURT
E.D. NEW YORK

No. CV-83-0457

CITY OF NEW YORK, ET AL., PLAINTIFFS

v.

MARGARET M. HECKLER, As Secretary of HHS, ET AL., DEFENDANTS

Jan. 11, 1984

PARTIAL GLOSSARY

1. POM's—SSA's Program Operations Manual Systems
2. QED Form—SSA's Psychiatric Review Form
3. RFC—Residual Functional Capacity
4. SSA—Social Security Administration
5. SSD—Social Security Disability
6. SSI—Supplemental Security Income
7. State ODD—New York State Office of Disability Determinations

MEMORANDUM AND ORDER

WEINSTEIN, Chief Judge:

This case raises difficult issues respecting protection of the rights of claimants by the bureaucracy

charged with dispensing social security disability and supplemental security income benefits. Courts assume that professionals such as doctors, lawyers and managers responsible for important government institutions will enforce the law with scrupulous impartiality and concern for the rights of their clients—here those claiming disability. That presumption of legality has been rebutted by evidence of denial of the rights of disabled persons acquiesced in by the professionals charged with assisting them. The result was particularly tragic in the instant case because of its devastating effect on thousands of mentally ill persons whose very disability prevented them from effectively confronting the system. To understand what happened and why we must describe how the system is designed and why it failed.

I. Facts

A. Statute and Regulations

The federal government provides disabled persons benefits through the Social Security Disability Insurance Program (SSD) and the Supplemental Security Income Program (SSI). Under both statutes, "disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). An individual "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age,

education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

By regulation the Secretary has adopted a five-step "sequential evaluation" process to determine whether individuals—both applicants and recipients—are eligible for benefits. The process is essentially the same for both SSD and SSI claimants.

At the first step, if the person is presently engaged in substantial gainful activity, he or she is disqualified from receiving benefits. 20 C.F.R. §§ 404.1520(a), 416.920(a).

At the second step, the Secretary must determine whether the claimant's condition is severe. If not, benefits are denied. 20 C.F.R. §§ 404.1520(c), 416.920(c).

If the impairment is severe, the Secretary as a third step determines whether or not the applicant meets or equals the listings of impairments set forth in the Social Security regulations. 20 C.F.R. §§ 404.-1520(d), 416.920(d). The listings contain *per se* disabling impairments. If a person meets or equals the listings, he or she is entitled to benefits.

If the claimant does not meet or equal the listings, the fourth step requires an assessment of the individual's residual functional capacity (RFC) and a determination of whether that capacity enables the individual to meet the demands of the work he or she performed in the past. If it does, the individual will not be entitled to benefits. 20 C.F.R. §§ 404.1520(e), 416.920(e).

Even if the claimant cannot perform his or her past work, the fifth steps calls for a determination of whether he or she can perform work available through

jobs in significant numbers in the national economy. This assessment is made in light of the claimant's residual functional capacity, age, education and work experience. A determination of entitlement to benefits at this point is known as a "medical-vocational allowance." 20 C.F.R. §§ 404.1520(f), 416.920(f).

B. Administrative Review Process

All initial disability decisions are made by the New York State Office of Disability Determinations (State ODD) pursuant to a contract between the State and the Social Security Administration (SSA). The case record on any claim or review is compiled by a lay disability analyst who gathers information from the claimant and his or her treating physicians, social workers, and family members. Where such information is insufficient, the disability analyst is responsible for procuring one or more consultative examinations from a contacting psychiatrist or psychologist. The consulting doctor prepares a report of mental status following State ODD's instructions.

The actual psychiatric assessment of a claimant is then made on the basis of a review of the file by a staff physician employed by State ODD. The review physician is directed to use SSA's Psychiatric Review Form (or "QED" form, as it is often referred to within SSA and its agencies) to record his or her findings on a numerical basis. In theory, that form is designed to record the results of analysis of various psychiatric examinations. Space is provided for assignment of a numerical rating to each of 17 component items in three major areas in order to formulate a total "Psychiatric Impairment Rating" on a five point scale, "one" being normal and "five" a condition which compels a finding that the Listings are met.

See SSA's Program Operations Manual System ("POMS") section 2211. Ratings of three and four are specifically defined to indicate severe mental illness which nevertheless does not meet or equal the listings of impairments.

Where the ratings on the QED form are three or four, regulations require that the review physician also assesses the individual claimant's residual functional capacity. Before late 1982, SSA had no formal requirements or forms by which to make this measurement. To date no instructions have been promulgated indicating how this assessment is to be made. A form was provided by SSA in late 1982, however, on which the physician is directed to indicate whether the claimant has "limited" or "unlimited" abilities to sustain seven separate mental activities such as "understand . . . job instructions," "interact with supervisors and co-workers," and "maintain concentration and attention." Where the evidence from the mental status examination and other data are inconclusive, instructions from the SSA Central Office have recognized that a full-scale "workshop evaluation" of the claimant's actual work abilities in a simulated work or work-like setting may prove helpful.

The physician's RFC assessment is then referred back to a disability analyst or specialist, a State ODD employee. After considering the claimant's RFC, age, experience, and education, this person decides whether the claimant can return to his former work or engage in any substantial gainful activity.

All decisions by the State ODD are subject to a "Quality Assurance Review" by the Regional and Central Offices of SSA. At the Regional level (Tier II), reviews are conducted by the region's analysts and physicians who have power to reverse any State

ODD determination. In order to conduct the quality assurance assessment, SSA officials have conducted sample reviews of State ODD determinations on a sufficient basis to ensure, with what they contend is 95% accuracy, that the uniform policies of the Social Security Administration are being followed by the states.

The same oversight function is performed on a higher level by the Central Office of SSA in Baltimore, Maryland to review regional performance (Tier III review). Where either Tier II or Tier III review indicates an "error," the case is returned. The returns function much like remands do in the court system, and create "precedents" for determining future cases. Thus the returns from Baltimore form the basis of the Region's and State's own quality assurance reviews and instructions to physicians, disability examiners and specialists. There is a strong incentive to conform to Baltimore's central office policy as evidenced in the returns because quite serious consequences to the careers and bureaucratic standing of individuals may follow to those persisting in "mistakes." The Social Security Administration's ultimate sanction would be to remove the entire disability program from the control of the state, resulting in the loss of hundreds of state government jobs.

The significance of Tier II and Tier III review within the Social Security disability system can hardly be overstated. Marvin Lachman, Director of the New York State ODD's Bureau of Quality Assurance and Planning, testified that both categories of reviews are carefully analyzed by the State agency, and then used extensively for the preparation of both training and informational materials. Dr. Anne Geller, Chief Consulting Psychiatrist within SSA's

Regional Office, similarly testified that Tier III reviews from Baltimore are both analyzed and followed in order to avoid the issuance of bureaucratic "demerits" within the system. Dr. Geller conceded that the standards reflected in these reviews constitute the best sources of guidance for the determination of future disability claims. A large number of returns from a higher level causes the region and state administrations to pressure the review physicians to conform to the line from Baltimore.

C. Plaintiff Class

The class is defined as:

> All individuals residing in the State of New York who have applied for or received Title II and/or Title XVI benefits on or after April 1, 1980, and who have been found by defendants to have a mental impairment which is severe (i.e., determined under 20 CFR § 404.1520(c) or § 416.930(c) to require evaluation under Appendix 1 of that Regulation), and whose applications for benefits have been or will be denied or whose benefits have been or will be terminated, on the basis of defendants' determination that such persons are capable of substantial gainful activity.

The class members suffer from severe mental illness. Its most common form is schizephrenia. In her testimony, Dr. Beatrice Braun, founder and director of a preventative treatment unit for the chronic mentally ill, described her typical patient:

> In this program, [the] typical patient would probably be a young, in their 20's or 30's, male patient. Because we have a long waiting list, we

> try to pick the patients who are most severely ill and who but for being in a day program would probably be in a state hospital. So we have the more severe group.
>
> These patients are usually quite well educated. Most are high school graduates. Some are college graduates and some have had some graduate school before the onset of this illness. So often their illness has had its onset in college and they'll be hospitalized and recover from the first acute episode perhaps return to college. Not functioning quite as well as they did before. Break down again and be hospitalized and maybe leave college and get a job for a brief period and jump around from one job to the other in and out of the hospital and gradually deteriorate until they need this kind of programming.

Despite the fact that many suffering from mental illness are well educated and may even have been employed in the past, deteriorating mental illness increasingly impairs ability to work. Prognosis is poor. Ultimately work becomes impossible. This may be true despite the absence of active delusions. Medication may control delusions and bizarre behavior, but at the same time promote symptoms which make a patient unable to work. Dr. Braum described this as "[t]he inability to perform behavior as opposed to performing bizarre behavior." Others testified to the lack of correlation between an ability of a mentally ill person to perform daily activities such as household chores and the ability to cope in a work environment.

As noted by Dr. Anne Geller, those suffering from schizophrenia have a particularly difficult time coping with a work situation:

> The basic underlying symptomology of the disease is a disorder affecting ability of any kind of an emotional response to people, disorder of attention, disorder of energy and inability to get motivated to get started. . . . And you're left with this residual person. This person . . . is really unable to sustain a kind of activity for any period of time.

The mentally ill are particularly vulnerable to bureaucratic errors. Some do not even understand the communications they receive from SSA. Others are afraid of the system. Even with help from social workers and others, many do not appeal denials or terminations.

An erroneous termination or denial of benefits to a mentally ill person means more than that he or she will no longer receive benefits. To many it may mean a severe medical setback. Dr. Braun testified that one of her patients who had not been hospitalized for fifteen years was hospitalized as a result of the trauma of having benefits cut off. This was not a unique case. Some slip into acute paranoia while others become suicidal.

D. Practices and Directives

Contrary to legal requirements, the Social Security Administration has consistently followed a policy which presumes that mentally disabled claimants who do not meet or equal the listings necessarily retain sufficient residual functional capacity to do at least "unskilled work." Sequential evaluation ends without assessing residual functional capacity or ability to engage in work. For younger individuals (those under 50 years of age), the presumption of ability to work is effectively conclusive. For older individuals (those

over 50 years of age), the presumption applies with equal force and will also result in a denial of benefits unless the claimant not only has a severely impaired RFC, but also has extreme deficiencies in the other "vocational factors" of education and work experience. The means of enforcement of the policy, through internal memoranda, returns, and reviews, has meant that the affected SSD or SSI applicant as well as counsel, social workers and advisers for a long time were unaware of its existence.

Evidence at trial revealed that this covert policy was followed consistently from 1978 until at least the early months of 1983. In 1983 the Social Security Administration yielded to pressure to allow medical vocational allowances for those with mental disabilities. The change was precipitated only after the filing of this lawsuit and after a preliminary injunction was issued on December 22, 1982, in the case of *Mental Health Association of Minnesota v. Schweiker*, 554 F. Supp. 157 (D.Minn. 1982), *aff'd.*, 720 F.2d 965 (8th Cir. 1983). The Minnesota Court declared the policy challenged in the instant case to be illegal within the Chicago Region of SSA.

Evidence of the fixed clandestine policy against those with mental illness is overwhelming. In 1978, the New York Office of Disability Determinations recognized that virtually all of the mental disability cases in which it had allowed benefits upon medical vocational grounds had been reversed by the Central Office of SSA upon Tier III review. When the New York Regional SSA officials failed to follow suit in Tier II reviews, the State sought clarification of the policy to avoid being caught between conflicting levels of review. The response from Baltimore was a very clear pronouncement that allowances in cases of men-

tal disability should not be granted unless the listings of impairments were met.

The effects of the clarification of policy were described at length by Dr. Geller. Commenting in particular on a group of severely ill individuals who in her opinion clearly could not work, she testified that her findings in favor of granting disability benefits were flatly overruled. She understood from Tier III reviews that "in younger workers medical vocational allowances are not considered when the impairment is psychiatric." Marvin Lachman similarly testified that only older workers were able to get medical vocational allowances for mental disorders. He estimated that the effect of SSA's policy was to cut the number of disability allowances in psychiatric cases in half.

Dr. Maurice Osinoff—a consulting psychiatrist with the State Office of Disability Determinations who was called as a witness for the defense—confirmed that prior to 1982 he had *never* seen an allowance of benefits for a mentally ill younger worker who did not meet the listing; this was despite the fact that he saw "many" cases where he and his colleagues did not themselves believe that the claimant could work. This result made him "uncomfortable" since it did not square with what he knew as a doctor. Dr. Theodore Cohen, a supervising consulting psychiatrist for the State ODD, similarly affirmed his understanding of SSA policy that a medical vocational allowance for a younger worker should not be allowed.

The distainful professional attitude towards the assumption of Baltimore that these claimants could really work is summarized by the following quotations from the record. Dr. Geller testified that Baltimore was telling her:

> Somewhat like Candide in the best possible world these people can find employment and sustain

> employment, basically they do have the capacity in some fantasyland of getting and maintaining employment.

Dr. Arthur Meyerson declared in regard to SSA's Psychiatric Review Form, that:

> [T]here is no way you can take the complex of human behaviors recorded in the psychiatric history, or even a summary of a single hospitalizations and narrow it down to 17 numbers. That is absolutely ludricrous. And if you's trying to do it for determination of one's capacity to work, I don't know if it becomes more or less ludricrous; but its a silly notion.

The confidential policy was reiterated in a series of unpublished internal memoranda which were circulated within SSA from 1979 through 1982. The most incriminating was issued by Dr. Jose Puig, then SSA's Acting Chief Consultant in psychiatry. He wrote:

> In the Mental Disorders, at least, a Total Psychiatric Impairment rating of less than "5" signifies the ability to engage in SGA [substantial gainful activity] at the level of unskilled work or higher. Where it does not mean that, the PRF [psychiatric review form] is being improperly used. Thus, where the PRF is properly employed, a separate RFC rating would be redundant and tantamount to giving double weight to the same case aspects.

This document was issued despite the sequential evaluation regulations which require a *separate assessment of* RFC and ability to engage in substantial gainful activity when a claimant has a severe impair-

ment (3 or 4 on the 5 point scale) but does not meet the listings.

Although there is evidence that the *sub rosa* policy is no longer in effect, the adverse influence on those terminated remain. In addition, New York City and State suffered expensive demands on their social service agencies, hospitals and shelters as a result of SSA's surreptitious undermining of the law.

II. Law and Application

A. Jurisdiction

Plaintiffs allege jurisdiction under the Social Security Act, 42 U.S.C. § 405(g), the mandamus statute, 28 U.S.C. § 1361, and the general federal question statute for violations of the Administrative Procedure Act, 5 U.S.C. § 553, the Freedom of Information Act, 5 U.S.C. § 552 and the due process clause of the Constitution. Because the court has jurisdiction under both the Social Security Act and the mandamus statute, it is not necessary to reach the question of jurisdiction over federal question claims pursuant to section 1331 of title 28.

1. 42 U.S.C. § 405(g).

For a court to have jurisdiction under section 205(g) of the Social Security Act (42 U.S.C. § 405(g)), the claimant must have presented his or her claim to the Social Security Administration. *Mathews v. Eldridge*, 424 U.S. 319, 328, 96 S.Ct. 893, 899, 47 L.Ed.2d 18 (1976); *Smith v. Schweiker*, 709 F.2d 777 (2d Cir. 1983). Defendants argue that not all of the class members have satisfied this threshold requirement. All those who have applied for benefits and had them denied by the Secretary meet the

requirement because the Secretary has made a decision. *See Elridge*, 424 U.S. 319, 328, 96 S.Ct. 893, 899, 47 L.Ed.2d 18.

Those class members who have had their benefits terminated under the continuing disability review also meet the presentment requirement. Plaintiffs' witnesses have testified and SSA's own internal guidelines demonstrate that those terminated under the continuing disability review who were determined not to be disabled because of their capacity for substantial gainful activity (the definition of the class) must have returned a questionnaire to SSA. If they had not done so, their benefits would have been terminated for non-cooperation.

Presentation need not be by a formal communication. *See Mathews v. Eldridge*, 424 U.S. 319, 329, 96 S.Ct. 893, 900, 47 L.Ed.2d 18 (1976) (answer to state questionnaire and letter to state disability department enough); *cf. Wheeler v. Heckler*, 719 F.2d 595, 600 (2d Cir. 1983) (the presentment requirement is to be construed liberally but is not met when plaintiffs do not allege even informal communications with SSA). Unlike the class in *Heckler v. Lopez*, —— U.S. ——, 104 S.Ct. 10, 77 L.Ed.2d 1431 (1983) (Rehnquist, Circuit Justice), the class in this case does not include persons "who have never questioned the initial determination that they cease to be be disabled." *Id.* 104 S.Ct. at 15.

A claimant also must have exhausted his or her administrative remedies in order to seek relief under section 205(g) except for two circumstances. First, the exhaustion requirement may be waived by the Secretary. *Mathews v. Eldridge*, 424 U.S. 319, 328, 96 S.Ct. 893, 899, 47 L.Ed.2d 18 (1976). Second, the case is one "where a claimant's interest in having

a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." *Id.* at 300, 96 S.Ct. at 900.

In *Eldridge*, the Court cited the factors which led it to conclude that Eldridge need not exhaust administrative remedies. His claim to a predeprivation hearing was "collateral" to his claim for benefits and he raised a colorable claim that "because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments." *Id.* The Second Circuit has interpreted *Eldridge* liberally to mean that:

> A waiver of the exhaustion requirement may be inferred where the plaintiffs' legal claims are collateral to their demand for benefits, where exhaustion would be a *pro forma* or futile gesture, or where the harm suffered in the interim would be irreparable in the sense that no *post hoc* relief would be adequate.

Smith v. Schweiker, 709 F.2d 777, 780 (2d Cir. 1983).

Plaintiffs' claims are collateral to their demand for benefits. They challenge the Secretary's failure to follow her own regulations and properly implement regulations in accordance with the Administrative Procedure Act. Plaintiffs do not challenge the substantive standards the Secretary uses to determine entitlement to benefits as did plaintiffs in *Heckler v. Lopez* and *Smith v. Schweiker*.

Exhaustion has been and would have been futile in challenging the Secretary's backdoor policy. In *Heckler v. Lopez*, —— U.S. ——, 104 S.Ct. 10, 15, 77 L.Ed.2d 1431 (1983), Justice Rehnquist empha-

sized that exhaustion should be required when a claim "could benefit from further factual development and refinement through the administrative process." These claims could not because there is "internal disarray within the Social Security Administration." *Smith v. Schweiker*, 709 F.2d 777, 781 (2d Cir. 1983). The evidence demonstrates that the State Office of Disability Determinations and the Regional Office both were adhering to a policy they believed contrary to the regulations because of pressure from Tier III reviews from Baltimore.

Reversal of an individual decision by an Administrative Law Judge could not alleviate the problem of other members of the class. Reversal would be on the fact of individual disability, not the illegal procedure. Even the administrative judges were unaware that the review physicians were deciding the residual functional capacity of a claimant on the basis of a *per se* policy rather than on medical judgment. Members of the class could not attack a policy they could not be aware existed.

Exhaustion serves no purpose in such a situation. *See Mercer v. Birchman*, 700 F.2d 828, 832 (2d. Cir. 1983) (exhaustion required because alleged procedural problems were acknowledged to be a deviation from established agency policy and were corrected, but exhaustion would not be required when conflict between coordinate agencies rendered administrative remedy illusory); *Mental Health Association v. Heckler*, 720 F.2d 965, 970-71 (8th Cir. 1983) (in case challenging policies similar to those in issue here, exhaustion waived because the procedural problem remains unaddressed even if in an individual case benefits were obtained); *Jones v. Califano*, 576 F.2d 12, 18, 19 (2d Cir. 1978) (exhaustion waived in case

challenging Secretary's continued adherence to position routinely rejected by Appeals Council).

Harm to members of the plaintiff class is irreparable. Loss of benefits is not the only damage termination causes to a mentally ill person. The ordeal of having to go through the administrative appeal process may trigger a severe medical setback. Many persons have been hospitalized due to the trauma of having disability benefits cut off. Interim benefits will not adequately protect plaintiffs from this harm. Nor will ultimate success if they manage to pursue their appeals. *See Mental Health Association v. Heckler*, 720 F.2d 965, 970 (8th Cir. 1983) ("the irreparable harm inherent in the pursuit of administrative relief . . . [is] not alleviated but rather [is] exacerbated by the high reversal rate on appeal"). Because of their disability, many members of the class were incapable of challenging the bureaucracy.

2. *28 U.S.C. § 1361*

The Second Circuit has held mandamus jurisdiction, 28 U.S.C. § 1361, available in appropriate social security cases. *Ellis v. Blum*, 643 F.2d 68 (2d Cir. 1981). The Eighth Circuit applied *Ellis* to hold mandamus jurisdiction available in the case before it challenging practices similar to those involved in this case. *Mental Health Association v. Heckler*, 720 F.2d 965 (8th Cir. 1983). Mandamus jurisdiction lies where the claims are "against the secretary for failure to comply" with regulations. *Smith v. Schweiker*, 709 F.2d 777, 779 (2d Cir. 1983). This challenge can be characterized as either the Secretary's failure to comply with regulations or as the issuance of *de facto* secret regulations. Thus the fact that plaintiffs seek reinstatement of benefits while the Secretary redeter-

mines their eligibilty for benefits by following the regulations does not bar mandamus. *See Ellis v. Blum, supra*, at 82.

Application of traditional principles of mandamus confirms its appropriateness here. Plaintiffs seek an order compelling the Secretary to comply with her regulations requiring an assessment of the residual functional capacity for each claimant who has a severe impairment but does not meet the listings. While the individual assessment requires the exercise of judgment and discretion, the Secretary has no discretion to refuse to perform that step or to perform it in such a way as to be meaningless. In similar circumstances, the writ has issued. *See, e.g., Ellis v. Blum*, 643 F.2d 68 (2d Cir. 1981) (mandamus available to compel Secretary to comply with notice requirements); *Jones v. Califano*, 576 F.2d 12 (2d Cir. 1978) (mandamus available to compel Secretary to comply with Appeals Council rulings concerning method of computing retroactive benefits); *White v. Mathews*, 559 F.2d 852 (2d Cir. 1977), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978) (mandamus available to compel Secretary to comply with time requirements in processing claims).

Those cases in which the Second Circuit has denied mandamus jurisdiction are clearly distinguishable. They did not involve a failure of the Secretary to follow the Social Security statute or its regulations. *See, e.g., Wheeler v. Heckler*, 719 F.2d 595, 598 n.1 (2d Cir. 1983) (mandamus unavailable in "challenge calling for an adjustment in the rules for determining whether an individual is entitled to benefits"); *Mercer v. Birchman*, 700 F.2d 828, 835 (2d Cir. 1983) (mandamus unavailable because plaintiffs only demonstrate that "in a few instances the eminently fair

procedures set up by the Secretary . . . had broken down").

Exhaustion of administrative remedies is required in mandamus cases, but the same principles of waiver apply as for jurisdiction under section 205 of the Social Security Act. *See Mercer v. Birchman*, 700 F.2d 828, 832 (2d Cir. 1983); *Ellis v. Blum*, 643 F.2d 68, 81 (2d Cir. 1981). For the same reasons discussed in reference to 42 U.S.C. § 405(g), exhaustion is deemed waived for purposes of jurisdiction under the mandamus statute, 28 U.S.C. § 1361. *Cf. Kennedy v. Harris*, 87 F.R.D. 372, 376-77 (S.D. Cal. 1980) (sixty day filing requirement of Social Security Act inapplicable when jurisdiction premised on mandamus).

B. Standing of State and City of New York

The State and City claim standing to maintain this action both on their own behalf and in a *parens patriae* capacity on behalf of their citizens.

1. *Own Injuries*

The determination of standing entails examination of both constitutional and prudential principles. "Article III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982) (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66 (1979)). In addition the party must demonstrate that the injury "is likely to be redressed by a favorable decision."

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. at 472, 102 S.Ct. at 758 (1982) (quoting *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976)).

Both the State and City meet the injury in fact requirement. Each has suffered economic injury in having to meet the needs of those removed from the disability rolls by the Secretary's policy. Their shelter programs, welfare system, and hospitals have been burdened. The project coordinator for an SSI outreach program in the City's shelter program for the homeless estimated that 40% of those housed in the shelters had been denied or terminated from SSI or SSD benefits. At least one third of those housed in the system had a history of psychiatric hospitalization.

A study by the New York State Department of Social Services estimated that if 85% of those terminated from Social Security in 1982 applied for public assistance, a $26.9 million increase in annual expenditures would be expected, of which the State and local governments would bear a substantial portion. The same study estimated that 33% of those terminated had been receiving benefits for a mental disability. Finally, an employee of the New York State Office of Mental Health Community Services testified that it costs approximately $1000 in staff time to help a mentally ill client pursue an appeal of denial of benefits to the Administrative Law Judge level.

The evidence is more than sufficient to support a finding of injury in fact. *See New York v. Schweiker*, 557 F.Supp. 354, 358 (S.D.N.Y. 1983) (requirement satisfied by State proof of danger of "having to cope

with the adverse health and social consequences of increased unwanted adolescent pregnancy and the financial burdens of additional persons in need of public assistance").

Also met is the requirement that the injury will be redressed by a favorable decision. If any of those who were terminated from benefits are restored to the rolls the City and State will be eligible to claim a portion of the retroactive benefits to cover services provided to the individuals when they were not receiving their benefits. The City and State also will be able to recover medical payments made on behalf of those later determined to have been wrongly denied SSI benefits because SSI eligibility entitles an individual to Medicaid. Substantial future payments for hospital care, shelter, welfare and social services will also be avoided. *See Graham v. Schweiker*, 545 F. Supp. 625, 627 (S.D.Fla. 1982) (in action by Florida challenging refugee relief regulations, State allowed to sue in proprietary capacity to seek "recovery of funds" and avoid "future payments").

In addition to the Article III requirements, the Court has developed "prudential" considerations that limit standing. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S.Ct. 752, 758-60, 70 L.Ed.2d 700 (1982). Given this Court's determination that it has jurisdiction over the class's claims, it may not be necessary to reach the standing issue, especially the prudential considerations. *See Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 160, 102 S.Ct. 205, 212, 70 L.Ed.2d 309 (1981) ("Because we find California has standing, we do not consider the standing of the other plaintiffs."); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263, 97 S.Ct. 555, 562, 50 L.Ed.2d 450 (1977) (since Court has at least one plaintiff before it with standing to assert rights, no need to consider standing of other plaintiffs). Nevertheless, the court finds that the City and State meet the prudential standing requirements. The injuries claimed by the City and State are not only those suffered by third parties, nor is the injury a "generalized grievance." *See Valley Forge*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982); *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). The State and City do claim injury to their citizens as the basis for *parens patriae* standing but in addition claim and have suffered injury to their own interests.

Finally, the State's and City's interests must be arguably "within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970), *quoted in Valley Forge*, 454 U.S. 464, 475, 102 S.Ct. 752, 760, 70 L.Ed.2d 700. In determining whether a party falls within the "zone of interests" of a challenged statute, the court may look to the terms of the statute, its purpose and any relevant legislative history. *Control Data Corp. v. Baldridge*, 655 F.2d 283, 294 D.C.Cir.), *cert. denied*, 454 U.S. 881, 102 S.Ct. 363, 70 L.Ed.2d 190 (1981). "The challenging party need only show that it is an intended beneficiary of the statute, not necessarily the primary one." *Constructores Civiles de Centroamerica S.A. v. Hannah*, 459 F.2d 1183, 1189 (D.C.Cir. 1972). "[U]nless the legislative history shows the plaintiff to be clearly not within the statute's 'zone of interests,' a court should demand no more than a sensible relation between

some subject of the statute and the plaintiff's interest in the outcome of the litigation." *National Collegiate Athletic Ass'n v. Califano*, 622 F.2d 1382, 1386 (10th Cir. 1980). Since the "zone of interests" is a prudential standing consideration, a court should be hesitant to deny a party standing on this basis alone without clear evidence of a legislative intent to restrict access to judicial review. *Cf. Barlow v. Collins*, 397 U.S. 159, 167, 90 S.Ct. 832, 838, 25 L.Ed.2d 192 (1970).

The Social Security disability and SSI programs were enacted in part to relieve state and local welfare burdens. This purpose is apparent, in the first place, from the language of the statute itself. For example, the SSI statute provides that the Secretary may enter into an agreement with the states to administer optional programs of state supplementation, and to determine eligibility for medical assistance. 42 U.S.C. § 1382e. The Secretary is also required to reimburse states for their costs in servicing blind or disabled people under state vocational rehabilitation programs. 42 U.S.C. §§ 422(d), 1382d.

The states, in turn, are required to maintain the same level of SSI benefits they provided to people who were receiving benefits under federal-state programs that were replaced by the SSI program (Pub.L. 93-66, Title II, Part B, § 212, *as amended*), and to continue to pass-through cost-of-living increases to SSI recipients. 42 U.S.C. § 1382. *See also* 42 U.S.C. § 1382i(d) (funds appropriated for medical and social services pilot program for certain handicapped individuals); 42 U.S.C. § 1383(g) (reimbursement to states for interim assistance payments).

In addition, the relevant legislative history of both the SSD and the SSI statutes support the City's and

the State's standing to bring an action against federal policies that violate the statute and have the effect of shifting the financial burden for the disabled back to the states and municipalities. Before the SSD program was enacted in 1956 the burden of caring for the disabled rested entirely on state, local, community and private sources. The Senate report to the 1956 Act stated that many of the disabled were supported by "State and local general assistance programs." S.Rep. No. 2133, 84 Cong., 2d Sess., *reprinted in* 1956 U.S.Code Cong. & Ad. News 3877, 3880.

In 1960, the SSD program was amended to permit disabled workers under age fifty to qualify for federal benefits. The Senate Committee Report stated that "many [of the disabled] who would be eligible for disability benefits except for the age limitation are now receiving payments under public assistance programs. With insurance benefits available to them, some of these individuals would no longer need assistance payments." The Committee also estimated a savings of $28 million in state and local public assistance expenditures as a result of the bill. S.Rep. No. 1856, 86th Cong., 2d Sess., *reprinted in* 1960 U.S. Code Cong. & Ad. News 3608, 3623.

In 1972, the SSI program was enacted to provide a uniform federal cash assistance grant for the indigent aged, blind and disabled. At the same time Congress repealed existing federal-state programs that provided cash assistance to these categories of people at state option with a partial state-local financial contribution. The legislative history of the 1972 amendments establishes that one of the purposes of the new federal SSI program was to relieve state and local governments of the soaring costs of the

existing programs. The House Report supporting the 1972 legislation found that "the bill would provide . . . very substantial relief to the states and localities." H.R.Rep. No. 231, 92d Cong., 2d Sess., *reprinted in* 1972 U.S.Code Cong. & Ad.News 4989, 4992. *See also* 117 Cong.Rec. H21092 (June 21, 1971) (statement of Rep. Mills; the new federal costs represent "fiscal relief for state and local governments"). The Report estimated that the bill would save the state and local governments of New York $188.4 million in welfare expenditures in fiscal year 1973. H.R. Rep. No. 231, *reprinted in* 1972 U.S. Code Cong. & Ad.News 4989, 5202.

The City and State plaintiffs clearly satisfy the broad requirement of being "arguably" within "the zone of interests" of the SSD and SSI programs. They challenge federal policies and practices that have the effect of shifting the financial burden of caring for the needy disabled back to the state and local governments. Defendant relies upon the fact that the District Court of Maryland has held that a state does not have standing to challenge terminations under the SSD program. *Doe v. Heckler*, 568 F.Supp. 681 (D. Md. 1983). That court, however, did not consider the legislative history of the programs and explicity did not reach the issue of standing under the SSI program. *Id.* at 683. Moreover, the challenge in *Doe v. Heckler* was to the validity of termination regulations. The challenge here is to the Secretary's failure to follow the statute and her own regulations. This failure has negated many of the benefits to state and local treasuries of the SSD and SSI programs. Since the City and State plaintiffs satisfy both Article III requirements and the prudential standing considerations, they have standing to maintain this action on their own behalf.

2. *Parens Patriae* Standing

A "state has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 102 S.Ct. 3260, 3269, 73 L.Ed.2d 995 (1982). Such an interest will support *parens patriae* standing. *Id.* There is no question that those interests are implicated in this case. As the Court pointed out in *Snapp*, *parens patriae* had its genesis in the English Crown's perogative to take responsibility for those with mental incapacity. *Id.* 102 S.Ct. at 3265. While not legally incapacitated, members of the class have many of the characteristics of those who are.

In *Snapp*, however, the Court stated in dicta that "a state does not have standing as *parens patriae* to bring an action against the federal government." *Id.* 102 S.Ct. at 3270 n.16. The statement is in a footnote to the Court's decision upholding *parens patriae* standing for Puerto Rico to sue apple growers for alleged violations of federal anti-discrimination laws. As authority for the statement, the Court cites *Massachusetts v. Mellon*, 262 U.S. 447, 485-86, 43 S.Ct. 597, 600-01, 67 L.Ed.2d 1078 (1923). Massachusetts had sued the secretary of the treasury challenging the constitutionality of an appropriations act. On the issue of whether Massachusetts could sue as the representative of its citizens, the Court held:

> *We need not go so far as to say that a state may never intervene by suit to protect its citizens* against any form of enforcement of unconstitutional acts of Congress; but we are clear that the right to do so does not arise here. . . . [T]he citizens of Massachusetts are also citizens of the United States. It cannot be conceded that a state,

> as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the state, under some circumstances, may sue in that capacity for the protection of its citizens . . . it is no part of its duty or power to enforce their rights in respect of their relations with the federal government.

262 U.S. at 485-86, 43 S.Ct. at 600 (emphasis added). In this case, New York does *not* seek to protect its citizens from the operation of a statute. It seeks to *enforce* both the social security statute and the Administrative Procedure Act. Massachusetts had invoked the Court's original jurisdiction. The Court's understandable desire to restrict that jurisdiction may explain its decision and later reliance on it. *See e.g., Jones ex rel. Louisiana v. Bowles*, 322 U.S. 707, 64 S.Ct. 1043, 88 L.Ed. 1551 (1944) (refusal to allow filing of complaint in Supreme Court). *See also Snapp*, 102 S.Ct. at 3271 (Brennan, J., concurring) ("the question whether a State can bring a *parens patriae* action within the original jurisdiction of this Court may well turn on considerations quite different from those implicated where the State seeks to press *parens patriae* claim in the district courts"); Hart &. Wechsler, The Federal Courts and the Federal System, 275-277 (2d ed. by P.M. Bator, D.L. Shapiro, P.J. Mishkin and H. Wechsler, 1973) 1981 Supp. at 100.

In *Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923), the Court also held that Massachusetts had no standing to sue on its own behalf on a theory of Congressional usurpation of power:

> [T]he complaint of the plaintiff state is brought to the naked contention that Congress has usurped the reserved powers of the several states by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; and it is plain that the question, as it is thus presented, is political, and not judicial in character, and therefore is not a matter which admits of the exercise of judical power.

262 U.S. at 483, 43 S.Ct. at 599. This aspect of the case may also go a long way toward explaining the holding on *parens patriae*. *See Washington Utilities & Transportation Commission v. F.C.C.*, 513 F.2d 1142, 1153 (9th Cir. 1975) (distinguishing *Mellon* in same fashion), *cert. denied*, 423 U.S. 836, 96 S.Ct. 62, 46 L.Ed.2d 54 (1975).

The Ninth Circuit has upheld *parens patriae* standing of a state against an agency of federal government. *Washington Utilities & Transportation Commission v. F.C.C.*, 513 F.2d 1142 (1975). That court held the *Mellon* doctrine inapplicable where the state sought "to vindicate the congressional will by preventing what it asserts to be a violation of a statute by the administrative agency charged with its enforcement." *Id.* at 1153. That is the situation we face. *See also Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (New York State has standing to sue Census Bureau both on *parens patriae* grounds and for injury to own interests; no discussion of *Mellon*), *rev'd on other grounds*, 653 F.2d 732 (2d Cir. 1981), *cert. denied*, 455 U.S. 999, 102 S.Ct. 1630, 71 L.Ed.2d 866 (1982). *But see Graham v. Schweiker*, 545 F. Supp. 625, 627 (S.D. Fla. 1982) (suit by Florida challenging regulations for refugee funding impli-

cates *parens patriae* interests; such interests may not be asserted against the federal government); *Pennsylvania v. Kleppe*, 533 F.2d 668, 676-77 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 977, 97 S.Ct. 485, 50 L.Ed.2d 584 (1976) (in suit by Pennsylvania against Small Business Administration for alleged incorrect classification in hurricane relief program, held that whether or not the *Mellon* doctrine bars all *parens patriae* actions against the federal government, federalism concerns warrant denying standing in such cases).

The *Mellon* doctrine is inapplicable in the instant case. New York does not question the validity of a federal statute. Nor does it invoke the Supreme Court's original jurisdiction. It merely joins a class of its citizens, who are incapable of acting effectively for themselves because they are mentally disabled, in seeking to require the Secretary to adhere to her own regulations.

A city generally does not have *parens patriae* standing. *See California v. Automobile Manufacturers Association, Inc.*, 481 F.2d 122 (9th Cir. 1973), *cert. denied*, 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d 336 (1973); *City of Hartford v. Town of Glastonbury*, 561 F.2d 1032, 1046-47 (2d Cir. 1976) (Meskill, J. dissenting), *rehearing en banc*, 561 F.2d 1048 (2d Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 766; 54 L.Ed.2d 781 (1978). Because the City has standing to sue for injury to its own interests, its standing on *parens patriae* grounds need not be addressed.

C. Mootness

Defendant asserts that several of the named plaintiffs' claims are moot because they are now receiving benefits. The doctrine only bars the claim of Jane

Doe II because, as plaintiffs admit, she received a favorable decision from an Administrative Law Judge one week before the complaint was filed. The rest of the named plaintiffs who are now receiving benefits may represent the class because their administrative success came after class certification. *Wheeler v. Heckler*, 719 F.2d 595, 600 (2d Cir. 1983) (citing *Jones v. Califano*, 576 F.2d 12, 22 (2d Cir. 1978)).

D. Timeliness

The Social Security Act requires that a party seek judicial review within sixty days of the final decision of the Secretary "or within such further time as the Secretary may allow." 42 U.S.C. § 405(g). Plaintiffs argue that the defendant may not raise the requirement as a bar now because the objection is not made in a timely fashion. *See Mathews v. Eldridge*, 424 U.S. 319, 328 n.9, 96 S.Ct. 893, 899 n.9, 47 L.Ed.2d 18 (Court does not consider whether sixty day requirement is met since not raised below in time, citing Fed. R. Civ.P. 8(c) and Rule 12(h)(1). The sixty day requirement is a statute of limitations and is waivable by the parties. It is not jurisdictional. *Id.*; *Weinberger v. Salfi*, 422 U.S. 749, 763-64, 95 S.Ct. 2457, 2466, 45 L.Ed.2d 522 (1975).

The Secretary raises the issue for the first time in her post-trial brief. This is rather late. *See Strauss v. Douglas Aircraft Co.*, 404 F.2d 1152, 1155 (2d Cir. 1968) ("[T]he Statute of Limitations is an affirmative or so-called 'personal privilege' defense which may be waived if not promptly pleaded, Fed.R.Civ. P. 8(c)."). In addition, the same reasons which justify implying waiver of the exhaustion requirement are stronger for the sixty day requirement because the statute of limitations is not, as is the ex-

haustion requirement, "central to the requisite grant of subject-matter jurisdiction." *Weinberger v. Salfi*, 422 U.S. 749, 764, 95 S.Ct. 2457, 2466, 45 L.Ed.2d 522 (1975). *See also Kennedy v. Harris*, 87 F.R.D. 372 (S.D. Cal. 1980) ("Where the purpose of the sixty day rule is to forestall the filing of belated or stale claims, it is not compelling in a class action . . . based on a challenge to a policy of the Secretary which applies . . . to all litigants.").

E. Illegal Acts by Defendant

The Social Security Act and its regulations require the Secretary to make a realistic, individual assessment of each claimant's ability to engage in substantial gainful activity. *See Heckler v. Campbell*, —— U.S. ——, 103 S.Ct. 1952, 1957, 76 L.Ed.2d 66 (1983). The class plaintiffs did not receive that assessment. On the contrary, SSA relied on bureaucratic instructions rather than individual assessments and overruled the medical opinions of its own consulting physicians that many of those whose claims they were instructed to deny could not, in fact, work. Physicians were pressured to reach "conclusions" contrary to their own professional beliefs in cases where they felt, at the very least, that additional evidence needed to be gathered in the form of a realistic work assessment. The resulting supremacy of bureaucracy over professional medical judgments and the flaunting of published, objective standards is contrary to the spirit and letter of the Social Security Act.

The Secretary's practices have violated the requirements of her own regulations. Defendants have ignored the five step sequential evaluation process by presuming that the failure to meet listings at step three or four of the process automatically translates into a residual functional capacity to do unskilled work

at steps four and five. The bureaucratic assessment of residual functional capacity if it was done at all was reduced to a paper charade where the SSA physician completed a cursory report or checked off a form knowing the conclusion had to be that the claimant had the capacity for unskilled work. Medical experts demonstrated to the court that the symptoms and restrictions of the listings of impairments do not measure an individual's capacity for work or his or her ability to withstand the stress or even the least demanding work. A denial of benefits on the basis utilized by the Secretary is arbitrary and contrary to the statute and regulations. Although the Secretary may rely on rulemaking to resolve classes of issues, the rules as applied may not conflict with the statute. *Heckler v. Campbell*, —— U.S. ——, 103 S.Ct. 1952, 1957, 1958, 76 L.Ed.2d 66 (1983).

Because the Secretary no longer is following the illegal policy in adjudicating cases, there is no need to reach plaintiff's contention that the illegal rule violated the Administrative Procedure Act and that the Secretary should be required to begin notice and comment procedures to implement a regulation covering the determination of residual functional capacity for mentally disabled individuals.

Plaintiffs also allege that the Secretary's policy violates plaintiff class members' due process rights. The finding that the policy is contrary to the social security statute, obviates the need to reach the constitutional issue. *See Califano v. Yamasaki*, 442 U.S. 682, 692, 99 S.Ct. 2545, 2553, 61 L.Ed.2d 176 (1979) ("A court presented with both statutory and constitutional grounds to support the relief requested usually should pass on the statutory claim before considering the constitutional question.").

III. Relief

The Secretary's illegal policy has affected all class members who have been denied or terminated from, benefits. As was conceded by defendants' own witness, administrative law judges routinely give great weight to the finding on residual functional capacity which is entered in the record by the state agency's internal review physician. Had the administrative law judges known that the assessment of residual functional capacity was not based on the doctor's professional opinion, the results in many cases might well have been different.

The decisions denying benefits or terminating benefits must be reopened and determined by the Secretary using proper standards. The usual administrative appeal rights will follow. In the interim the Secretary will, from the date of this order, reinstate benefits of all class members until the claimant's eligibility is properly determined by the Secretary. No retroactive benefits will be awarded until the Secretary determines whether or not the initial denial was correct.

This relief is within this court's remedial powers under the Social Security Act. Class relief is available in actions brought under section 205(g) of the Act. *Califano v. Yamasaki*, 422 U.S. 682, 698-701, 99 S.Ct. 2545, 2556-58, 61 L.Ed.2d 176 (1979). Injunctive relief is also available. *Id.* at 704-06, 99 S.Ct. at 2559-60. Interim payments are an appropriate form of relief for a procedural violation of the social security statute. *See Mental Health Association of Minnesota v. Heckler*, 720 F.2d 965 (8th Cir. 1983); *Day v. Schweiker*, 685 F.2d 19, 23-24 (2d Cir. 1982), *cert. granted*, —— U.S. ——, 103 S.Ct. 1873, 76 L.Ed.2d 806 (1983); *White v. Mathews*, 559

F.2d 852, 861 (2d Cir. 1977) (the Social Security Act does not "exclude the possibility of interim payments ordered by a court exercising its remedial power"), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978). *See also Novak v. Harris*, 504 F.Supp. 101, 107-08 (E.D. N.Y. 1980) (sovereign immunity does not bar award of retroactive benefits; Social Security Act operates as a waiver of sovereign immunity). Mandamus jurisdiction also supports an allowance of interim benefits. *See Ellis v. Blum*, 643 F.2d 68, 81 (2d Cir. 1981); *Schisler v. Heckler*, 574 F. Supp. 1538, 1546 (W.D. N.Y. 1983).

This memorandum and order constitutes a final judgment. Rule 58, Federal Rules of Civil Procedure. It embodies findings of fact and law. Rule 52, Federal Rules of Civil Procedure.

The judgment is stayed for ten days to permit application for a stay to the Court of Appeals.

So ordered.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-83-0457 (JBW)

THE CITY OF NEW YORK, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, THE STATE OF NEW YORK, CESAR PERALES, as Commissioner of the New York State Department of Social Services, WILLIAM F. MORRIS, As Acting Commissioner of the New York State Office of Mental Health, and JANE DOES, I and II and III, and RICHARD ROES, I, II, III, IV and V on behalf of themselves and others similarly situated, PLAINTIFFS

—against—

MARGARET HECKLER, as Secertary of the United States Department of Health and Human Services, and JOHN A. SVAHN, as Commissioner of the United States Social Security Administration, DEFENDANTS

AMENDED JUDGMENT AND QRDER

This case having come to be heard by the court on October 31, November 1, 2, 3, 4, 7, and 8, 1983; and the court's Memorandum, Findings of Fact, Conclusions of Law, and Judgment having been issued on January 11, 1983; and the parties having now proposed supplemental provisions to be incorporated in an amended judgment pursuant to Rules 52, 59 and

60 of the Federal Rules of Civil Procedure; it is now hereby

ORDERED, ADJUDGED and DECREED:

1. That the definition of the class is amended to be as follows:

All individuals residing in the State of New York who have applied for or received Title II and/or Title XVI benefits and who, between April 1, 1980 and May 15,* 1983, were found by the New York Office of Disability Determinations to have a functional psychotic or functional non-psychotic mental impairment which is severe (i.e., determined under 20 CFR § 404.1520(c) or § 416.930(c) to require evaluation under Appendix I of that Regulation), and whose applications for benefits have been denied or whose benefits have been or will be terminated, on the basis of defendants' determination that such persons are capable of substantial gainful activity.

2. All decisions of the Secretary or her agents to deny benefits or to terminate benefits to class members must promptly be reopened and redetermined by the Secretary using proper standards; provided, however, that any class member who has an active appeal pending before an Administrative Law Judge or the Appeals Council * shall have the option of proceeding with such an appeal upon the existing record rather than proceeding with the administra-

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* The government seeks a date of March 31 and the plaintiffs seek a date of July 1. While the record supports the July 1, 1983 date; it is likely that the agreement of February 10, 1983 was affectuated by May 15.

* United States Courts are not bound by this judgment.

tive reopening of his or her case. Upon completion of administrative reopening and review, the usual administrative appeal rights will follow.

3. In the interim, the Secretary will promptly reinstate benefits, from the date of this amended judgment and order, to all class members who have previously been found to be entitled to benefits which were subsequently terminated. Such reinstated benefits shall continue until the claimant's eligibility is properly determined by the Secretary. No retroactive benefits will otherwise ** be awarded until the Secretary determines whether or not the initial termination was correct.

4. Defendants are hereby ordered to notify all affected class members that their claim for benefits is being reviewed, that the initial denial may have been in error, that the Social Security Administration may be asking for additional evidence relating to the impairment, and that if the Social Security Administration determines that the initial denial was in error, the claimant will be entitled to back benefits from the date of the claimant's application for or termination from benefits. This notice shall further provide that for any class member who has an active appeal pending before an Administrative Law Judge or the Appeals Council, that class member shall have the option to proceed with such appeal upon the existing record rather than with the administrative reopening of his or her case.

Dated: January 31, 1984

/s/ Jack B. Weinstein
United States District Judge

** Some retroactivity may be involved for the period listed now and the time the first payment is made under this order.

APPENDIX E

EASTERN DISTRICT OF NEW YORK
UNITED STATES DISTRICT COURT

CV-83-0457 (JBW)

THE CITY OF NEW YORK, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, THE STATE OF NEW YORK, CESAR PERALES, as Commissioner of the New York State Department of Social Services, WILLIAM F. MORRIS, As Acting Commissioner of the New York State Office of Mental Health, and JANE DOES, I and II and III, and RICHARD ROES, I, II, III, IV and V on behalf of themselves and others similarly situated, PLAINTIFFS

—against—

MARGARET HECKLER, as Secertary of the United States Department of Health and Human Services, and JOHN A. SVAHN, as Commissioner of the United States Social Security Administration, DEFENDANTS

ORDER

Defendants having moved this court pursuant to Rule 62 of the Federal Rules of Civil Procedure for a stay pending appeal of the court's judgment dated January 11, 1984, or of any amended judgment incorporating amendments proposed by the parties at oral argument on January 26, 1984, this court concludes for the reasons stated orally on the record on January 26, 1984, that defendants motion should be granted in part and denied in part. This court having also determined to direct entry of an amended judgment,

IT IS HEREBY ORDERED:

1. That the amended judgment is stayed for a period of ten days to permit application for a further stay to the court of appeals.

2. That the amended judgment is further stayed pending the decision of an appeal before the United States Court of Appeals for the Second Circuit except to the extent that such judgment provides:

(a) that defendants shall immediately undertake to identify all members of the affected class;

(b) that benefits shall be reinstated as of the date of their order, but not otherwise awarded retroactively, to those class members who have previously been found to be entitled to benefits which were subsequently terminated pursuant to a "Continuing Disability Investigation" review; and

(c) that the full effect of the judgment shall be implemented for all class members with current appeals pending before an Administrative Law Judge or the Appeals Council, or who have received a final decision after hearing on or after the sixtieth day prior to the filing of this action on February 8, 1983.

3. That the partial stay set in paragraph "2" of this order is conditioned upon defendants filing of a notice of appeal from the court's amended judgment within ten days from the entry thereof.

Dated: January 31, 1984

/s/ Jack B. Weinstein
JACK B. WEINSTEIN
U.S.D.J.

APPENDIX F

REPORT #1

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

13004-12-8547

Refer to: Memorandum

Date: January 3, 1983

From: Commissioner of Social Security

Subject: Policy Guides for the Evaluation of Mental Disorders—ACTION

To: See Below
(Unnumbered)

This memorandum is intended to make sure that everyone involved in disability decisionmaking has a clear understanding of how to evaluate cases involving mental impairments. Regional Commissioners in coordination with Field Assessment Officers are to work with DDS Administrators immediately to assure that these priniples are reviewed with every adjudicator.

When a disability claim involving a mental impairment cannot be allowed on medical grounds alone, i.e., when the impairment falls short of the severity described by the listings, yet there is a limitation in the ability to perform basic work-related functions, a finding of ability to engage in substantial gainful ac-

tivity cannot be justified solely on the basis that the impairment does not meet or equal the level of severity depicted by the listings.

The sequential evalution process must continue in the claim with consideration of vocational factors in light of the claimant's residual functional capacity (RFC). RFC assessments in mental disorders include consideration of such factors as the ability to understand, to carry out and remember instructions, and to respond appropriately to supervision, coworkers and customary pressures in a routine work setting (see sections 404.1545 and 416.945 of SSA's regulations and POMS DI 2105). Current procedures call for such assessments to be recorded on the RFC form (POMS DI 3004).

Our goal is to provide the most complete possible criteria for evaluating disability for use at all levels of adjudication. Much activity has been underway to achieve this. Evaluation of mental impairments has been a high priority area. Regional Commissioners must work closely with DDS's and Field Assessment Officers to assure adequate training on the evaluation of mental disorders.

/s/ John A. Svahn
JOHN A. SVAHN

Addressees:

All Regional Commissioners, SSA
All Field Assessment Offices
All Disability Determination Services
Executive Staff

APPENDIX G

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides:

> Judicial review
>
> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this

section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

2. Section 5 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1801, provides:

MORATORIUM ON MENTAL IMPAIRMENT REVIEWS

(a) The Secretary of Health and Human Services (hereafter in this section referred to as the "Secretary") shall revise the criteria embodied under the category "Mental Disorders" in the "Listing of Impairments" in effect on the date of the enactment of this Act under appendix 1 to subpart P of part 404 of title 20 of the Code of Federal Regulations. The revised criteria and listings, alone and in combination with assessments of the residual functional capacity of the individuals involved, shall be designed to realistically evaluate the ability of a mentally impaired individual to engage in substantial gainful activity in a competitive workplace environment. Regulations establishing such revised criteria and listings shall be published no later than 120 days after the date of the enactment of this Act.

(b)(1) Until such time as revised criteria have been established by regulation in accordance with subsection (a), no continuing eligibility review shall be caried out under section 221(i) of the Social Security Act, or under the corresponding requirements established for disability determinations and reviews under title XVI of such Act, with respect to any individual previously determined to be under a disability by reason of a mental impairment if—

(A) no initial decision on such review has been rendered with respect to such in-

dividual prior to the date of the enactment of this Act, or

(B) an initial decision on such review was rendered with respect to such individual prior to the date of the enactment of this Act but a timely appeal from such decision was filed or was pending on or after June 7, 1983.

For purposes of this paragraph and subsection (c)(1) the term "continuing eligibility review", when used to refer to a review of a previous determination of disability, includes any reconsideration of or hearing on the initial decision rendered in such review as well as such initial decision itself, and any review by the Appeals Council of the hearing decision.

(2) Paragraph (1) shall not apply in any case where the Secretary determines that fraud was involved in the prior determination, or where an individual (other than an individual eligible to receive benefits under section 1619 of the Social Security Act) is determined by the Secretary to be engaged in substantial gainful activity (or gainful activity, in the case of a widow, surviving divorced wife, widower, or surviving divorced husband for purposes of section 202(e) and (f) of such Act).

(c)(1) Any initial determination that an individual is not under a disability by reason of a mental impairment and any determination that an individual is not under a disability by reason of a mental impairment in a reconsideration of or hearing on an initial disability determination, made or held under title II or XVI of the Social Security Act after the date of the enactment of

this Act and prior to the date on which revised criteria are established by regulation in accordance with subsection (a), and any determination that an individual is not under a disability by reason of a mental impairment made under or in accordance with title II or XVI of such Act in a reconsideration of, hearing on, review by the Appeals Council of, or judicial review of a decision rendered in any continuing eligibility review to which subsection (b)(1) applies, shall be redetermined by the Secretary as soon as feasible after the date on which such criteria are so established, applying such revised criteria.

(2) In the case of a redetermination under paragraph (1) of a prior action which found that an individual was not under a disability, if such indiviudal is found on redetermination to be under a disability, such redetermination shall be applied as though it had been made at the time of such prior action.

(3) Any individual with a mental impairment who was found to be not disabled pursuant to an initial disability determination or a continuing eligibility review between March 1, 1981, and the date of the enactment of this Act, and who reapplies for benefits under title II or XVI of the Social Security Act, may be determined to be under a disability during the period considered in the most recent prior determination. Any reapplication under this paragraph must be filed within one year after the date of the enactment of this Act, and benefits payable as a result of the preceding sentence shall be paid only on the basis of the reapplication.

3. 20 C.F.R. 404.1520 provides:

EVALUATION OF DISABILITY

Evaluation of disability in general.

(a) *Steps in evalauting disability.* We consider all material facts to determine whether you are disabled. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider your physical or mental impairment(s). Your impairment must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review further.

(b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.

(c) *You must have a severe impairment.* If you do not have any impairment(s) which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not now have a severe impairment.

(d) *When your impairment meets or equals a listed impairment in Appendix 1.* If you have an impairment which meets the duration requirement and is listed in Appendix 1, or we determine that the impairment is equal to one of the listed impairments, we will find you disabled without considering your age, education, and work experience.

(e) *Your impairment must prevent you from doing past revelant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment, we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment must prevent you from doing any other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment, we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled.

(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule (see § 404.1562).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461831 10235

OPPOSITION

BRIEF

NO. 84-1923

Supreme Court, U.S.
FILED
AUG 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARGARET M. HECKLER,
Secretary of Health and Human Services, *et al.*,

Petitioners,

—against—

CITY OF NEW YORK, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether the court of appeals was correct in waiving the final decision requirement of 42 U.S.C. § 405(g) for certain members of the class where the district court found that the Secretary of Health and Human Services consistently applied an illegal policy in adjudicating the claims for benefits of severely mentally ill individuals, that the interests of the Secretary in requiring exhaustion would not be served, and that the administrative process could not vindicate the procedural rights asserted in the action.

2. Whether the court of appeals was correct in tolling the time limitation of 42 U.S.C. § 405(g), or deeming that it had been implicitly extended, for certain members of the class where it found that the secretive conduct of the Secretary of Health and Human Services prevented those class members from knowing of the violation of their rights.

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NO. 84-1923

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARGARET M. HECKLER,
Secretary of Health and Human Services, *et al.*,

Petitioners,

—against—

CITY OF NEW YORK, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT[1]

Petitioners here concede—and did not contest in the court of appeals—the findings of the district court that

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[1] Pursuant to Rules 22 and 34.2, respondents respectfully refer this Court to the Petition for the list of parties, citation to opinions below, statement of grounds of jurisdiction of this Court, and statement of statutory and regulatory provisions involved.

for several years the Secretary of Health and Human Services ("the Secretary") wrongfully denied benefits under Title II and XVI of the Social Security Act to thousands of mentally disabled individuals in New York State.[2] They nevertheless distort those findings in challenging the district court's jurisdiction over the class members who did not exhaust their administrative remedies or file suit within sixty days of receiving a final administrative decision.

Specifically, petitioners repeatedly assert that the erroneous denials of benefits resulted merely from an apparent error in interpretation of the regulations by subordinate officials that could have been corrected by individual appeals through the administrative process. In so arguing, they ignore the determinative district court findings that the Secretary, for about five years, enforced a systematic "fixed clandestine policy," under which benefits were terminated or denied without the required individualized assessment of the claimant's ability to work, and that the record in individual cases was tainted, prejudicing the possibility of a fair administrative appeal. Pet. at 38a-39a.[3]

Those findings were as essential to the decision below on the final decision and time limitation requirements of 42 U.S.C. § 405(g) as they were to the merits. This Court has stated that waiver of the final decision requirement

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[2] Title II is codified at 42 U.S.C. §§ 401 *et seq.*, and sets out the requirements of the Social Security Disability Insurance ("SSDI") program. Title XVI is codified at 42 U.S.C. §§ 1381 *et seq.*, and sets out the requirements of the Supplemental Security Income ("SSI") program.

[3] References to "Pet. at ——" are to pages of the Petition and the appendices thereto.

of 42 U.S.C. § 405(g) and tolling of its time limitation are permitted in certain factual circumstances. The lower courts found that such circumstances were present here. Petitioners' efforts to recast the facts to their own liking itself shows that, when properly viewed as dependent on facts unique to this case, the issues presented do not warrant review by this Court.[4]

COUNTERSTATEMENT OF THE CASE

The Plaintiffs

This action was brought by the City and State of New York and a class of claimants for disability benefits. The class was restricted to claimants with functional psychotic and non-psychotic disorders, a group more generally known as the "chronically mentally ill,"[5] and, within that group,

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[4] This Court has often stated that it is reluctant to disturb findings of fact concurred in by two lower courts, *e.g.*, *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982); *see National Collegiate Athletic Association* v. *Board of Regents*, —— U.S. ——, 104 S.Ct. 2948, 2959 n.15 (1984), and petitioners have provided no justification for ignoring these findings. The Court should therefore accept these findings as binding. *See Branto* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980).

[5] Many other mentally impaired claimants, including those with chronic brain syndrome, mental retardation and neurological disorders, were not subject to the particular rules affecting the chronically mentally ill and thus were excluded from the class.

The class was further restricted to those individuals whose benefits were terminated or whose claims for benefits were denied

(Footnote continued on following page)

to those who had impairments the Secretary found to be "severe." Many of the class members suffer from schizophrenia, a thought disorder which affects a person's ability to organize the basic activities of life. Even during its residual phases, when acute psychotic symptoms such as hallucinations, delusions and bizarre behavior are controlled by medication or other forms of therapy, the individual's ability to work is seriously impaired. Pet. at 37a. Many of the common medications used to control psychotic symptoms themselves inhibit social and vocational functioning. Pet. at 37a. Furthermore, the disease renders individuals extremely vulnerable to stress, which can trigger a renewal of psychotic symptoms, often leading to rehospitalization or, in extreme circumstances, suicide. Pet. at 38a.

Class members were joined in the action by the City of New York and State of New York, acting not only as *parens patriae*, but because of financial injuries to themselves. One effect of the Secretary's policies was to shift financial responsibility for disabled chronically mentally ill individuals to the state and local governments, which funded replacement public assistance and housed in their shelters many of those who became homeless after losing the federal benefits. Pet. at 49a.

(Footnote continued from preceding page)

between April 1, 1980 and May 15, 1983. Although the district court found that the policy was in existence as early as 1978, it determined April 1, 1980 as the starting date for the class. The district court closed the class as of May 15, 1983—three months after this lawsuit was filed—because it found that the policy was "most likely" discontinued by that date. Pet. at 65a n.*. *See infra* at 10.

Statutory and Regulatory Framework

To be eligible for SSDI or SSI benefits, a claimant must meet two statutory requirements. The claimant must show (1) a lasting physical or mental impairment which (2) precludes the ability to engage in substantial gainful activity. 42 U.S.C. §§ 423(d)(1)(A), (d)(2)(A); 1382c(a)(3)(A), (a)(3)(B). The critical question is whether the claimant is able to do competitive work.

The Secretary has adopted a five-step, sequential process to decide a claim of disability ("sequential evaluation process"). At step one, the Secretary determines whether the claimant is engaged in substantial gainful activity; if so, the claimant is denied benefits, since he or she is, in fact, working. 20 C.F.R. §§ 404.1520(b); 416.920(b). At step two, the Secretary determines whether the claimant's impairment is severe. If not, the claimant is denied benefits at this step. 20 C.F.R. §§ 404.1520(c); 416.920(c). Only individuals who passed this step of the sequential evaluation process were included in the class certified by the district court.

If the claimant suffers from a severe impairment, the Secretary determines, at step three, whether the claimant's medical symptoms meet or equal the Listings of Impairments ("Listings") set forth in the Social Security regulations, 20 C.F.R. §§ 404.1520(d); 416.920(d). The Listings specify conditions which *per se* preclude an individual from engaging in any kind of gainful work. If a claimant's condition meets or equals the Listings, he or she is entitled to benefits, without any further evaluation of the individual's ability to work.

If the claimant's impairment does not meet or equal the Listings, the Secretary evaluates the claimant's "residual functional capacity" for work. The regulations require an

individualized assessment of the medical and vocational evidence by physicians expert in the disabling effects of illness who are expected to reach conclusions based on their training and judgment. 20 C.F.R. §§ 404.1546; 416.946. With respect to a claim of disability based on a mental impairment, the Secretary must evaluate the evidence, including the consulting physician's findings, regarding, *inter alia*, the claimant's ability to understand, carry out and remember instructions, and the ability to respond appropriately to supervision, to co-workers, and to work under pressure. 20 C.F.R. §§ 404.1545(c); 416.945(c). If the Secretary finds at step four that the claimant retains the capacity to do his or her past work, the claimant will not be entitled to benefits.

If the claimant cannot perform his or her past work, the Secretary determines, at the fifth and final stage, whether the claimant could perform other work available in the national economy. The Secretary considers the claimant's residual functional capacity, experience, age, education and past work history. 20 C.F.R. §§ 404.1520(f); 416.920(f). If the individual is found to be incapable of performing any such work, he or she is awarded benefits. A decision that a person is disabled at the fourth or fifth step is referred to as a "medical-vocational" allowance.[6]

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[6] Petitioners suggest that decisions awarding or denying benefits are made independently by the state agencies. Pet. at 19. This statement ignores the statutory scheme establishing overlapping state agency and Social Security Administration ("SSA") roles in the decision-making process.

Indeed, the Secretary has substantial control over all decisions regarding claims for benefits. A claimant presents a claim for benefits to a state agency, which makes the initial determination,

(Footnote continued on following page)

The District Court's Findings

After a seven-day trial, at which twenty-two witnesses were heard, the district court found that between 1978 and spring 1983, the Secretary enforced a secret policy that cut short the five-step sequential evaluation process and, contrary to the requirements of the statute and regulations, precluded an individualized assessment of the claimant's ability to work. The Secretary required that state agency claims adjudicators presume that a severely mentally disabled individual whose impairments did not meet or equal the Listings could perform at least "unskilled work," thus eliminating the assessment of the claimant's residual functional capacity. Pet. at 38a.[7]

(Footnote continued from preceding page)

42 U.S.C. § 421(a), according to SSA standards (set out in the Program Operations Manual System), and using SSA procedures and forms. Pet. at 33a-34a. If the decision is adverse to the claimant, he or she may ask the state agency for a *de novo* reconsideration. 20 C.F.R. §§ 404.907-404.921. Both the initial and reconsideration decisions of the state agency are reviewable by the Secretary on her own motion, 42 U.S.C. § 421(c), and ultimately, after review by an administrative law judge, the SSA Appeals Council may make the final determination on the claim. Moreover, all state agency decisions are subject to quality assurance review.

[7] As evidence of the conclusiveness of the presumption, the district court cited the testimony of a consulting psychiatrist to the Secretary, called as a witness by petitioners, that before 1982, despite the fact that he and his colleagues saw many cases in which they thought the claimant was unfit to work, he *never* saw the grant of benefits for a younger worker who did not meet the Listings. This result did not square with what he and his colleagues believed as doctors. Pet. at 40a.

The district court found that, instead of relying on the expert medical opinions of her own review physicians, the Secretary enforced instructions which

> . . . pressured [physicians] to reach "conclusions" contrary to their own professional beliefs in cases where they felt, at the very least, that additional evidence needed to be gathered in the form of a realistic work assessment.

Pet. at 60a. If an evaluation of residual functional capacity was done at all, it was "reduced to a paper charade where the SSA physicians completed a cursory report or checked off a form," knowing the result in advance. Pet. at 61a. As a result, the review physicians had to recommend the denial of benefits even when their medical judgment indicated that claimants were disabled. Pet. at 40a-41a.[8]

The district court found that the unlawful policy was primarily enforced through the Secretary's quality assurance program. Pet. at 33a-36a, 39a-42a. All decisions of the state agency claims adjudicators are subject to review by the regional and central Social Security Administration ("SSA") offices. Pet. at 34a-35a. When either review indicates an "error," the case is returned to the state agency for correction of the "error." Pet. at 35a. Remands of "erroneous" decisions function as "precedents" for future decisions by the state examiners. Pet. at 35a.

When the New York State agency expressed opposition to the policy, "[t]he response from Baltimore was a very

[8] The Secretary's own Chief Psychiatrist in the New York Region stated: "It is clear that whether a claimant can withstand the stress of competitive work or not is never a consideration. Unfortunately, these are guidlines we have to follow even though common sense and psychiatric experience dictate otherwise." (Resp. Ex. 6 at trial.)

clear pronouncement that allowances in cases of mental disability should not be granted unless the listings of impairments were met." Pet. at 39a-40a. Despite their opposition, the New York State claims adjudicators had "a strong incentive to conform" to the central office's policy in that individual careers and bureaucratic standing could suffer as a result of too many "mistakes." Pet. at 35a.

The district court found that the policy was also enforced through a series of internal directives, unpublished and unavailable policy statements, and correspondence between the state agency and the Secretary. The "most incriminating" of these, according to the district court, was an internal memorandum which directed that if a claimant had a severe impairment which did not meet or equal the Listings, a separate "residual functional capacity rating would be redundant." Pet. at 41a-42a. Contrary to the statute and regulations, with this memorandum, SSA essentially prohibited a separate assessment of residual functional capacity where a claimant had a severe impairment that did not meet the Listings. No publicly available document described this policy.

The district court specifically found that because the policy was developed and enforced through the means summarized above, claimants, their counsel, social workers and the Secretary's own administrative law judges were unaware of its existence. Pet. at 39a, 45a, 62a. The district court thus concluded that the policy was "covert," Pet. at 39a, "clandestine," Pet. at 39a, and "*sub rosa*," Pet. at 42a.

Although knowledge of the policy was withheld from everyone except state claims adjudicators and quality assurance reviewers, its effects were felt throughout the adjudicative process. The administrative law judges rou-

tinely gave great weight to the findings on residual functional capacity entered in the record. Pet. at 62a. They did not know that the state agency determination of residual functional capacity was not based on the medical judgments required by law but was entered by rote according to instructions given to the physicians. As the district court found, if the administrative law judges had known that the assessment of residual functional capacity was not based on the doctor's professional opinion, the results in many cases might well have been different. Pet. at 62a.

The district court found that the illegal policy continued well into 1983. Pet. at 65a n.*. Contrary to petitioners' claims in this Court, the Secretary conceded below that the policy existed at least until March 31, 1983. Pet. at 65a n.*. The district court found that the record supported a July 1, 1983 date as the end of the illegal policy, but ruled that the end of the policy was "likely" effectuated by May 15, 1983. Pet. at 65a n.*. In any event, the district court found—and at one time petitioners agreed—that the policy did not end until after the filing of this lawsuit on February 8, 1983.

Based on these findings, the district court held that it could exercise jurisdiction over the entire class notwithstanding the failure by some members to exhaust administrative remedies or to file suit in district court within sixty days of a final decision on their claims. This conclusion was bolstered by the fact that "[t]he result [of the policy] was particularly tragic in the instant case because of its devastating effect on thousands of mentally ill persons. . . ." Pet. at 31a. An erroneous termination or denial of benefits meant irreparable injuries to this particular class of claimants: many suffered severe medical setbacks, Pet. at 38a, some were rendered homeless, Pet. at 49a, and others suffered rehospitalization, acute paranoia, or became suicidal as a result of the trauma. Pet. at 38a. The district court also specifically found that, because of the nature of their impairments, members of the respondent class could not "effectively . . . [confront] the system," Pet. at 31a, in that the "ordeal of going through the appeal process [could] trigger a severe medical setback." Pet. at 46a.[9]

The district court ordered a narrow remedy, restricted to claimants who are identified by the Secretary as having severe mental disabilities and whose claims were denied or benefits terminated during the time the policy was in effect. The district court ordered the Secretary to reopen the claims of these individuals and to follow the legal procedure for evaluating those claims.[10]

Determination by the Court of Appeals of the Jurisdictional Issues Raised by Petitioners

On appeal, petitioners did not challenge the district court's determination on the merits, but contended, *inter alia,* that the district court did not have jurisdiction over the entire class, because not all the class members had complied with the requirement of 42 U.S.C. § 405(g) that they obtain a final decision from the Secretary, and not all had complied with the time limitation for seeking judicial

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[9] The district court also found that petitioners had not raised the time limitation issue in a timely fashion and thus had waived it. Pet. at 59a. *Mathews* v. *Eldridge,* 424 U.S. 319, 328 n. 9 (1976); *Weinberger* v. *Salfi,* 422 U.S. 749, 763-64 (1974); Fed. Rules Civ. Proc. 8(c), 12(h)(1).

[10] The district court also ordered the Secretary to reinstate, pending redetermination of their claims, those class members whom the Secretary identified as having their benefits terminated during the class period.

review under that section. As they do here, petitioners argued that although they had injured a class of particularly vulnerable individuals, concealed the existence of the illegal policy, and tainted the appeals process, the district court had no jurisdiction to remedy the wrong.

The court of appeals, relying on *Weinberger* v. *Salfi*, 422 U.S. 749 (1974), *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), and *Heckler* v. *Ringer*, —— U.S. ——, 104 S.Ct. 2013 (1984), rejected those contentions, holding that the exhaustion requirement was waived and that the time limitation had been tolled. In so doing, the court of appeals also affirmed the findings of fact on which these rulings were predicated.

In considering the exhaustion requirement, the court of appeals followed the "Supreme Court's . . . practical approach to Section 405(g)." Pet. at 13a. It held that the interests of the Secretary in requiring exhaustion were not served here in that

> This is not a case like . . . *Heckler* v. *Ringer, supra,* where the claim asserted could benefit from further factual development or from the agency's "experience and expertise," . . . Nor is this a case where exhaustion serves to "prevent[] premature interference with agency processes" or to allow the agency "an opportunity to correct its own error."

Pet. at 15a (citations omitted). The court of appeals found that exhaustion would be futile in that "the administrative process cannot vindicate the procedural rights asserted in this litigation." Pet. at 15a.

In analyzing the time limitation, the court of appeals determined, in reliance on *Salfi* and *Eldridge*, that the provision at issue is not jurisdictional and that on the facts

of this case, "the 60-day period was effectively tolled during the time that SSA's policy of applying the challenged presumption concerning residual functional capacity remained operative but undisclosed."[11] Pet. at 18a. Because of the "[g]overnment's secretive conduct," class members "knew of the denial or loss of benefits [but] did not and could not know that those adverse decisions had been made on the basis of a systematic procedural irregularity that rendered them subject to court challenge." Pet. at 18a. Compliance with the time limitation was therefore excused until "such time as plaintiffs had a reasonable opportunity to learn the facts concerning the cause of action," which was "after the filing of the complaint in this action." *Id.*

REASONS FOR DENYING THE PETITION

In upholding the district court's jurisdiction over all members of the class, the court of appeals applied the principles articulated by this Court, interpreting 42 U.S.C. § 405(g), to the facts of the case, and decided the issues in accordance with that authority. The court of appeals was correct in its rejection of the Secretary's jurisdictional challenges. Its holdings are not inconsistent with those of other courts of appeals. Moreover, the facts of this case, as found by the district court and upheld by the court of appeals, are unique and so unlikely to recur that there is no reason for this Court to review the legal conclusions flowing from those facts.

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[11] The court of appeals also noted that in an earlier case, *Mental Health Association of Minnesota* v. *Schweiker*, 554 F.Supp. 157 (D. Minn. 1982), *aff'd sub nom. Mental Health Association of Minnesota* v. *Heckler*, 720 F.2d 965 (8th Cir. 1983), which concerned the use of the same illegal procedure in the Chicago region, "SSA erroneously represented that the presumption was not in use in other SSA regions." Pet. at 18a n.5.

A. The Court of Appeals was Correct, Based on the Facts Found and Conceded Below, in Waiving the Final Decision Requirement and in Tolling the Time Limitation.

This Court has held that 42 U.S.C. § 405(g) ("§ 405(g)") contains a non-waivable jurisdictional requirement, that of presenting a claim of entitlement to benefits to the Secretary, *Salfi,* 422 U.S. at 764; *Ringer,* —— U.S. ——, 104 S. Ct. at 2023; a waivable requirement that a claimant obtain a final decision of the Secretary before seeking judicial review, *Salfi,* 422 U.S. at 766-67; *Eldridge,* 424 U.S. at 328; *Ringer,* —— U.S. ——, 104 S.Ct. at 2023; a statute of limitations for the appeal of the Secretary's final decision to the courts, *Salfi,* 422 U.S. at 764; *Eldridge,* 424 U.S. at 328 n.9; and a venue provision governing the district in which the court action should be brought, *Salfi,* 422 U.S. at 764; *Eldridge,* 424 U.S. at 328 n.9. In this case, the court of appeals correctly determined that the final decision requirement should be waived and that the time limitation should be tolled.

1. Exhaustion

In their challenge to the decision of the court of appeals, petitioners attack the approach to exhaustion under § 405 (g) set out by this Court nearly ten years ago and consistently followed since. In *Eldridge,* this Court ruled that the final decision requirement of § 405(g) may be waived, either by the Secretary herself, or by a court. The Court stated that "cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate," 424 U.S. at 330, and indicated that lower courts should

take a " 'practical' approach" in determining whether or not deference is owed. 424 U.S. at 331 n.11. *See also Ringer,* ——U.S. at ——, 104 S.Ct. at 2023.[12]

The approach taken by the court of appeals is precisely what was mandated by *Eldridge* and more recently affirmed by this Court in *Ringer.* As required by *Eldridge,* the court of appeals carefully balanced the interests of the class members in not exhausting their administrative remedies against the Secretary's interests in requiring exhaustion. It found that, as was the case in *Eldridge* and as was not true in *Ringer,* the administrative process could not vindicate the procedural rights asserted by the respondents here. The administrative law judges were reviewing a tainted record and were not even aware of the existence of the unlawful procedure. Even where a claimant received a decision granting benefits, the decision could have been based on many factors unrelated to a correction of the illegal procedure and would have had no effect on the continued enforcement of the policy. Pet. at 15a.

On the other hand, the court of appeals found that "no legitimate interest" would be advanced in requiring class members to exhaust administrative remedies. Pet. at 15a. The plaintiffs' claims would not benefit from further factual development or from the agency's " 'experience and expertise.' " Pet. at 15a. Indeed, the illegal policy required the claims adjudicators to ignore the medical judgments

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[12] The practical approach taken by the court of appeals conforms to this Court's general analysis of whether exhaustion requirements should be waived. The Court has, for instance, taken a practical approach to the finality requirements of 28 U.S.C. §§ 1291 and 1257. *Eldridge,* 424 U.S. at 331 n.11. *See, e.g., Shaffer* v. *Heitner,* 433 U.S. 186, 195-96 n.12 (1977) (quoting *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 486 (1975)); *see also* 9 *Moore's Federal Practice* ¶110.10 (1985).

of the Secretary's own experts and consulting physicians. Nor would exhaustion "'prevent[] premature interference with agency processes' or . . . allow the agency 'an opportunity to correct its own error.'" Pet. at 15a (citation omitted). As early as 1978, the Secretary was made aware of the illegality of her policy, but remained determined to ignore the opposition of her own regional office and of the state agency claims adjudicators. In fact, the Secretary corrected her error only after the filing of this action and the grant of a preliminary injunction in *Mental Health Association of Minnesota* v. *Schweiker*, 554 F.Supp. 157 (D. Minn. 1982), *aff'd* 720 F.2d 965 (8th Cir. 1983). The court of appeals thus upheld the district court's finding that, under these circumstances, "[a]s in *Eldridge*, it is not realistic to 'expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient . . . . in an adjudicatory context,' 424 U.S. at 330." Pet. at 15a.

The court of appeals also considered the specific factors which the court in *Eldridge* found entitled that class to waiver. It reviewed the nature of respondents' claim—that the application of a conclusive presumption denied the claimants their statutory and regulatory right to an individualized assessment of their ability to work—and determined that while not "wholly" collateral, the legal claim was "substantially" collateral to respondents' claim for benefits. Pet. at 14a. The court of appeals held that, "the class here complains fundamentally of a procedural irregularity and not of the Secretary's substantive standards of eligibility." *Id.* In fact, as the court of appeals observed, the district court was not asked to and did not rule on the merits of *any* of the underlying claims for benefits. *Id.* Nor did it order the use of any particular substantive standard for determining the claim. Instead,

the district court ordered the Secretary to reopen each claim and to use the Secretary's own published procedure in evaluating the claim. *Id.* at 62a, 65a.

In addition, the court of appeals properly concluded that the respondent class members raised a colorable claim that recovery of retroactive benefits through the appeals process would not compensate them fully. The nature of their impairments rendered them particularly vulnerable to any cessation of benefits. Pet. at 14a. The court of appeals specifically affirmed the district court's finding that the harm to claimants was irreparable and "that '[t]he ordeal of having to go through the administrative appeal process' would likely trigger a 'severe medical setback' for many members of the class." Pet. at 14a.

Petitioners' rejection of the approach taken by the court of appeals is premised on a mischaracterization of the exhaustion requirement applicable here, and of the effect of waiving it. There is, indeed, a carefully constructed appeals process which claimants should usually follow before obtaining judicial review of an adverse determination of a claim. But, contrary to the representations of petitioners, the court of appeals did not upset that process. This case was not the typical Social Security class action, challenging an administrative interpretation of the Social Security Act, such as whether a certain operation is reimburseable under Medicare. Rather, it concerned an entire system system of adjudication for psychiatric claims gone wildly awry, where a program designed to help people instead traumatized them. To insist on exhaustion, far from "facilitat[ing] the orderly and sympathetic administration of the disability program . . . *Heckler* v. *Day*, —— U.S. ——, 104 S.Ct. 2249, 2251 (1984)," Pet. at 3, would condone the Secretary's disorderly and unsympathetic administration of the process.

Petitioners contend that waiver of the exhaustion requirement is appropriate only when the precise constellation of factors found in *Eldridge* is present. Pet. at 17, 20-21. There is no indication in either *Eldridge* or *Ringer* that the waiver doctrine is so limited. Moreover, petitioners' focus on the "wholly collateral" language of *Eldridge* reflects the wooden approach to waiver that they urge, without justification, upon this Court. Petitioners ignore the "core principle"

> that statutorily created finality requirements should, if possible, be construed so as not to cause *crucial collateral claims* to be lost and potentially irreparable injuries to be suffered. . . .

424 U.S. at 331 n.11 (emphasis added). In making much ado about the semantic distinction between "wholly collateral" and "substantially collateral," petitioners thus lose track of the "core" issue: that the lower courts found that a "crucial" collateral claim—the challenge to the denial of the statutory right to an individualized assessment of ability to work—might be lost if the claimants were forced to exhaust administrative remedies.[13]

Petitioners' reliance on *Ringer* is misplaced. In that case, this Court reaffirmed its holding that a court may,

[13] Petitioners also suggest that to meet the *Eldridge* requirements, a claimant must be raising a constitutional challenge and alleging irreparable harm of constitutional dimensions. Pet. at 21-22. There is no support for these assertions in the language of *Eldridge*. *See Eldridge*, 424 U.S. at 330-332. Furthermore, with respect to the nature of the harm, the injuries considered by this Court in *Eldridge* were not constitutional. This Court stated in *Eldridge* that "because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him [Eldridge] in a way not recompensable through retroactive payments." *Id.* at 331.

in "certain special cases," waive exhaustion, and that *Eldridge* "was such a case." —— U.S. at ——, 104 S.Ct. at 2023. The *Ringer* analysis does not suggest that the *Eldridge* factors must be present in every case, but that a court should take account of the particular circumstances surrounding each case. Furthermore, the analysis of the court of appeals here is consistent with that of *Ringer;* the outcomes differed only because the facts differed. Specifically, this Court observed that the claims of the three *Ringer* plaintiffs who met the presentment requirement, unlike the claims here, were actually claims for benefits, however they were couched. In addition, the Court explicitly found that, unlike the situation here, exhaustion would not be "futile," and that the claimants made no colorable claim of irreparable injury inasmuch as an award of benefits after review at the appeals stage was likely and would recompense them fully. Finally, the Court ruled that the issue in *Ringer* was a matter of medical judgment "peculiarly within the Secretary's competence." —— U.S. ——, 104 S.Ct. at 2024 n.11. The district court made the opposite finding here—the Secretary consistently ignored the medical judgment of her own physicians and experts. Pet. at 40a.

Petitioners' effort to convince this Court to reject the court of appeals' exhaustion analysis is, at bottom, an attempt to relitigate the facts. Petitioners argue that if respondents are required to exhaust their administrative remedies, the Secretary will have an opportunity to correct her own errors, and will have an opportunity to apply her agency's experience and expertise. Pet. at 19. First, they claim that the memorandum issued by the Commissioner of the SSA on January 3, 1983 (Petitioners' Ex. M at trial; attached to Pet. as Appendix F, Pet. at 69a-70a) shows that had the class members exhausted their administrative remedies, the Secretary would have eventually corrected her policy. Pet. at 18-19. The district court rejected this

argument. In any event, the significance of this memorandum is undermined by the Secretary's position at trial, where she conceded that the policy was in effect until March 31, 1983—after the date of the memorandum and after the filing of this lawsuit. *See supra* at 10. Furthermore, the memorandum was written only in response to the entry of a preliminary injunction by the district court in *Mental Health Association of Minnesota* v. *Schweiker*, 554 F.Supp. 157 (D. Minn. 1982). Pet. at 39a.

Second, petitioners assert that exhaustion should not be waived here because individuals who received an adverse decision were not prevented from seeking further consideration from an administrative law judge or the Appeals Council. Pet. at 18. This assertion ignores the findings below, upheld on appeal, that "the [g]overnment's secretive conduct *prevent*[*ed*] plaintiffs from knowing of a violation of rights," Pet. at 18a (emphasis added), and that the administrative law judges, who were "unaware that review physicians were deciding the residual functional capacity of a claimant on the basis of a *per se* policy rather than on medical judgment," Pet. at 45a, "routinely gave great weight" to these findings in reaching their decisions, Pet. at 62a, so that review at that stage was "tainted," Pet. at 5a.[14]

[14] Petitioners argue that the subsequent histories of the named plaintiffs illustrate their point that exhaustion would have been neither futile nor wasteful for all class members, because claimants may receive or be denied benefits for reasons "unrelated" to the claim in this case. Pet. at 19-20. Petitioners made a similar argument unsuccessfully below, Pet. at 15a, and it should be rejected here. Petitioners miss the point of respondents' challenge to the process by which they were denied benefits. As the court of appeals held, not even an eventual grant of benefits (much less a grant or denial on "unrelated" grounds) can vindicate a challenge to the procedure of adjudicating claims.

The court of appeals did precisely what it was supposed to do under this Court's precedents. It reached a narrow and reasonable resolution of the issues before it, tied closely to the facts of the case. The differences in the outcomes between *Ringer* and this case were a result only of the differing facts. There will always be disputes about the proper outcome of applying the *Eldridge* test to a particular case. Controversy about an individual outcome based on an established test, however, hardly merits review by this Court.

2. *Time Limitation*

This Court has explicitly held that the requirement that a claimant commence an action within sixty days after the Secretary mails her decision is "a statute of limitations . . . waivable by the parties." *Salfi*, 422 U.S. at 763-64; *Eldridge*, 424 U.S. at 328 n.9. The Court has also implicitly ruled to the same effect when stating in *Heckler* v. *Day*, —— U.S. ——, 104 S.Ct. at 2253 n.14, that the presentment and exhaustion requirements are the only prerequisites to jurisdiction under § 405(g). In addition, in *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), where the propriety of the class definition was under consideration,[15] the Court expressly adopted a dissenting opinion by Justice Stevens in an earlier case, *Norton* v. *Mathews*, 427 U.S. 524 (1976), where, citing *Salfi* and *Eldridge*, he noted

[15] The brief of petitioners in that case, at 70 n.50, specifically challenged the propriety of the class definition there for failure to incorporate the time limitation. The Court held that the class definition was overbroad only on the ground that it included individuals who did not satisfy the non-waivable requirement of presentment. 442 U.S. at 703-04.

that the time limitation was waivable. *Yamasaki*, 442 U.S. at 701, *citing Norton*, 427 U.S. at 536 n.4.[16]

Petitioners contend that this line of authority should be ignored because of the general principle that limitations in suits against the government are jurisdictional. Pet. at 24-25. This principle is inapplicable here. Unlike the statutes at issue in the cases cited by petitioners, § 405(g) expressly provides that the applicable time period may be extended by the Secretary: an individual may obtain review of "a final decision . . . by a civil action commenced within sixty days after the mailing to him of notice of such decision *or within such further time as the Secretary may allow*" (emphasis added). This Court has held that where, as here, Congress has delegated authority to set a time limitation, that limitation is not jurisdictional and is always subject to waiver. *Schacht* v. *United States*, 398 U.S. 58, 64 (1970).

As the court of appeals noted, however, it is not necessary to resolve the semantic question whether the time limitation of § 405(g) is jurisdictional or is a statute of limitations. Pet. at 18a-19a, n.6. Since the Secretary clearly has the authority to extend the time limitation, the courts may deem that she has implicitly done so. Action by the Secretary which allows further time need not be restricted to concessions in court. This principle is illus-

[16] Both before and after writing his opinion dissenting in part from the Court's refusal to vacate a stay issued in *Lopez*, —— U.S. at ——, 104 S.Ct. at 221-22, duly noted by the court of appeals, Pet. at 16a, Justice Stevens has stated that, in his view, the time limitation is *not* jurisdictional. His separate opinion in *Ringer*, —— U.S. at ——, 104 S.Ct. at 2028, 2033-34, incorporates the *Salfi* and *Eldridge* statements to the effect that § 405(g) contains a statute of limitations waivable by the parties. This statement was also noted by the court of appeals. Pet. at 17a.

trated by cases in which a claim that has been denied is reasserted. It has repeatedly been held that, even if the Secretary has formally refused to reopen the claim, any later consideration of the same claim on the merits at any administrative level is treated as or deemed to be an exercise of administrative discretion to reopen the claim. *See Jelinek* v. *Heckler*, 764 F.2d 507, 508 (8th Cir. 1985); *Taylor* v. *Heckler*, 738 F.2d 1112, 1114-15 (10th Cir. 1984); *McGowen* v. *Harris*, 666 F.2d 60 (4th Cir. 1981). Furthermore, in *Biron* v. *Harris*, 668 F.2d 259 (6th Cir. 1982), one of the cases relied on by petitioners for the claim that the time limitation is jurisdictional, the court accepted the holdings in two prior cases that an invitation by the Appeals Council to a claimant to submit additional material constituted "an implicit extension of the filing limitation." *Id.* at 261. By analogy to these cases, the court of appeals was justified in suggesting that even if the time limitation is viewed as jurisdictional, it was tolled by the Secretary's action in not disclosing her illegal policy.

Petitioners also contend that, if the time limitation is a statute of limitations, it should not be tolled. It is basic, however, that the doctrine of equitable tolling "is read into every federal statute of limitations." *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946); *see also Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342, 348 (1874).[17] Petitioners are thus relegated to challenging the applicability of the doctrine to the facts or to relitigating the facts.

[17] The doctrine of equitable tolling has been held applicable even to a statute measuring the applicable time period from some objectively fixed starting point, rather than from the time of accrual

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Specifically, petitioners assert that any tolling must cease once an individual receives an adverse determination, irrespective of the basis stated in that determination, and consequently, the court of appeals' analysis was "seriously flawed" in its reliance on *Barrett* v. *United States,* 689 F.2d 324 (2d Cir. 1982), *cert. den. sub nom. Cattell* v. *Barrett,* 426 U.S. 1131 (1983). Pet. at 27. *Barrett* held that a claim accrues under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.,* when the plaintiff has discovered an injury and its probable cause. Clearly, in this case, respondents knew of their injuries, which were the denials of benefits. Petitioners disingenuously assert, however, that the causes of the injuries were the adverse decisions. This characterization ignores the lower courts' find-

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of an action. *Exploration Co.* v. *United States,* 247 U.S. 435, 449 (1918) (since equitable tolling was the "established doctrine of this court" when the statute at issue was enacted, it should be presumed to have been intended to be made applicable thereto).

Soriano v. *United States,* 352 U.S. 270 (1957), cited by petitioners, Pet. at 25, is distinguishable, as it did not concern the doctrine of equitable tolling, but rather the theory that a limitation period should be tolled during a time of war.

Finally, the principle stressed by petitioners, that waivers of sovereign immunity must be strictly construed, is not determinative. As the Court wrote in *Indian Towing Co.* v. *United States,* 350 U.S. 61, 69 (1955):

> Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.

See also Canadian Aviator, Ltd. v. *United States,* 324 U.S. 215, 222 (1945); *Crown Coat Front Co.* v. *United States,* 386 U.S. 503, 520-21 (1967); *FHA* v. *Burr,* 309 U.S. 242, 245 (1940).

ings that the causes of the injuries were the Secretary's illegal presumption. Claimants here did *not* know of the illegal policy until after the commencement of this lawsuit.

In addition, petitioners contend that the court of appeals' logic would "have the effect of tolling the running of the 60-day period . . . whenever [there was] an erroneous interpretation of the statute or regulations that was contained in internal operating instructions . . . which are not required to be published . . . ." Pet. at 28. In so arguing petitioners seek to relitigate the district court and court of appeals' findings that the Secretary's policy was "secretive" and "clandestine."

Since petitioners cannot relitigate the finding that the policy was kept secret from claimants, they must be contesting the legal significance of that finding. But the characterization of the courts below is plainly within the established sense of the phrase "secret law" as used by this Court. *See NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 153 (1975).[18] This is particularly so because the

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[18] Respondents alleged, as a second theory in their complaint, that the Secretary's policy and practice comprised an illegal body of secret law in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the requirements of due process. *See* Pet. at 42a, 61a. The district court held that, since the Secretary had abandoned her policy after this suit was filed, it did not have to reach the question whether respondents should be granted relief on this claim. The district court did find, however, that the Secretary had followed a fixed policy, enunciated in a series of internal memoranda. But, even if this policy was not subject to notice and comment rulemaking under the APA, and even if it

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policy specifically contradicted the Secretary's own published regulations, on which claimants are entitled to rely. Furthermore, the district court in *Mental Health Association of Minnesota,* 554 F.Supp. at 167, found that the same policy at issue here, as implemented in the Chicago region, was "a substantive rule or policy" which should have been, but was not, enacted in accordance with the Administrative Procedure Act, 5 U.S.C. § 553. (That decision was not challenged on appeal. *See* 720 F.2d 965.)[19]

B. There is No Conflict Among the Circuits on these Issues.

There is no conflict among the circuits on whether exhaustion should be required where the Secretary has implemented a covert, illegal policy which denies claimants a procedural right. The one other circuit court to consider this precise question, in a case challenging the ap-

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was not subject to the publication requirement of the FOIA, 5 U.S.C. § 552(a)(1)(D), (as petitioners now contend, Pet. at 28), the internal memoranda establishing the policy were subject to the indexing and availability requirements of the FOIA, 5 U.S.C. § 552(a)(2), under which, for example, SSA's Program Operations Manual System is made available to the public. The Secretary failed to comply with even this last requirement.

[19] Petitioners argue that Congress' directives contained in the Social Security Disability Benefits Reform Act of 1984, Pub.L. No. 98-460, § 5, 98 Stat. 1794, 1801 (1984), should be determinative as to the scope of relief granted to the class members. Pet. at 29-30. Contrary to petitioners' assertion, the court of appeals considered and rejected, on the Secretary's petition for rehearing, each of the arguments petitioners raise here with regard to the provisions of the 1984 Reform Act. Pet. at 25a-29a.

plication of this policy in the Chicago region, is in accord with the result here. *Mental Health Association of Minnesota* v. *Heckler,* 720 F.2d at 970-71.

Petitioners cite only *Hyatt* v. *Heckler,* 757 F.2d 1455 (4th Cir. 1985) to the contrary. In that case, the Fourth Circuit held that exhaustion was required because the claims there were "inextricably intertwined with claims for benefits . . . ." *Id.* at 1460. Here, the court of appeals found that respondents' claims are *not* inextricably intertwined with claims for benefits. Thus, *Hyatt* does not address whether waiver of the final decision requirement would be appropriate under the circumstances found here.

In addition, the underlying claim in *Hyatt* concerned the non-acquiescence policy, also at issue in *Heckler* v. *Lopez,* —— U.S. ——, 104 S.Ct. 10, 14 (1983) (per Rehnquist, Circuit Justice). The court of appeals, in characterizing the claim here, considered *Lopez* and explained that the claim in *Lopez* was *not* collateral, because it was a "challenge [ ] to the Secretary's substantive standards." Pet. at 14a. It held, however, that such a claim was distinguishable from that advanced here, which is "fundamentally of a procedural irregularity." *Id. Hyatt* does not present any issue different from *Lopez,* so that just as the holding here is consistent with *Lopez,* it is consistent with *Hyatt.*

With respect to the time limitation question, there is no true conflict among the circuits on the issue decided by the court of appeals. The determinative issue in this case was not whether the time limitation should be labelled a statute of limitations or a jurisdictional requirement, but whether it should have been tolled for equitable reasons or whether it was implicitly extended by the Secretary. Petitioners cite four cases, *Hyatt,* 757 F.2d at 1460-61, *Hunt* v. *Schweiker,* 685 F.2d 121 (4th Cir. 1982), *Biron,* 668

F.2d at 261, and *Whipp* v. *Weinberger*, 505 F.2d 800, 801 (6th Cir. 1974), in arguing that the decision of the court of appeals conflicts with decisions of the Fourth and Sixth Circuits. Pet. at 29. Petitioners assume, however, based on the holding that the time limitation is jurisdictional, that the Fourth and Sixth Circuit Courts of Appeals would refuse to toll the time limitation, even if the facts were such that equitable tolling or a deeming of an implicit extension would apply. But, as shown above, petitioners' assumption—that the label "jurisdiction" forecloses further inquiry—is wrong. Since the other courts never confronted the issue resolved by the court of appeals here, there is no true conflict. Furthermore, as noted above, it was recognized in *Biron* that a court may find that the Secretary has implicitly extended the time limitation, even where such limitation is labelled jurisdictional. 668 F.2d at 261.

C. The Decision Below was Narrowly Tailored to an Unusual Set of Facts that is Unlikely to Recur.

Petitioners, in contending that this Court should grant review, assert that the decision below threatens to damage broadly the entire SSA administrative process. Pet. at 15-16, 23. Specifically, petitioners urge that the holding below will permit courts to waive exhaustion even where the Secretary could correct a challenged "interpretation" in the course of administrative review. Similarly, petitioners assert that the holding below would permit tolling even in the case of a challenge to an allegedly erroneous interpretation in a mere internal operating manual. Petitioners claim that there are some sixty other cases presenting such challenges.

Respondents have demonstrated in this memorandum that the court of appeals' decision is narrowly and carefully tailored to the unique facts of this case, which are unlikely to recur. It does not concern, as do the other pending cases with which respondents are familiar, a broad challenge to a general SSA procedure, or a challenge to the propriety of a substantive standard. This case concerns a challenge to an unpublished procedure used only in cases of claimants with severe psychological disabilities. The remedy here was not to disregard the administrative review system, but to remand the class members' cases to that system for review under the Secretary's own published regulations. The holding here is premised on the finding that, in evaluating claims of severe mental disabilities, the SSA system was in "internal disarray," because bureaucrats in Baltimore overrode the judgment of SSA's own review physicians. In this extraordinary circumstance, it is clearly appropriate for the district court to exercise jurisdiction.[20]

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[20] Petitioners also attack the reliance by the district court and court of appeals, as an alternative jurisdictional basis, on 28 U.S.C. § 1361. Petitioners nowhere attempt to demonstrate why this ruling is worthy of review by this Court. In any event, if, as respondents show here, the court of appeals' decision with respect to § 405(g) is correct, and does not warrant review, there is no reason for this Court to review the holdings of the lower courts with respect to § 1361.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

August 10, 1985

Respectfully submitted,

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REPLY

BRIEF

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No. 84-1923

In the Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents' effort to defend the court of appeals' flouting of the exhaustion and 60-day filing requirements in 42 U.S.C. 405(g) is wholly unavailing. And, contrary to respondents' assertion, there is nothing narrow about the court of appeals' rulings. In fact, the decision below unfortunately is typical of the manner in which numerous lower courts have continued to disregard the explicit terms of 42 U.S.C. 405(g) and to assert jurisdiction in class actions over the cases of thousands of individuals who simply abandoned their claims for benefits by electing not to seek further administrative or judicial review. There are more than 60 pending class actions under the disability programs alone that present similar questions concerning the exhaustion or 60-day filing requirement under 42 U.S.C. 405(g). In addition, the court of appeals' rulings in this case squarely conflict with decisions of this Court and other courts of

appeals. See Pet. 23, 29. Review by this Court therefore is plainly warranted.

A. *Exhaustion of Administrative Remedies*

1. The decision below permits a court to dispense with the requirement of exhaustion of administrative remedies based on its own ad hoc balancing of such factors as whether pursuing a particular legal issue in further administrative proceedings would be "futile," whether the issue involved can be characterized as "procedural" or "substantially collateral," and whether there has been a "colorable" showing of hardship by the claimant (or some unspecified number of a class of claimants). See Pet. App. 12a-15a. Respondents explicitly endorse this case-by-case judicial balancing approach. It is telling, however, that in the entire section of their argument devoted to the exhaustion question (Br. in Opp. 14-21), respondents do not discuss the relevant language in 42 U.S.C. 405(g), do not mention the implementing regulations that have governed the administrative review of claims since 1940, and do not even cite *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), this Court's seminal decision on the exhaustion requirement. Respondents apparently recognize that the court of appeals' exhaustion holding cannot be squared with any of these principal sources of guidance in interpreting 42 U.S.C. 405(g).

Section 405(g) permits an individual to obtain judicial review only after the Secretary has rendered her "final decision" on his claim for benefits. As this Court repeatedly has recognized, the governing regulations provide that the Secretary has rendered her "final decision" only after the claimant has pressed his claim for benefits through all levels of administrative review, including the Appeals Council. See *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), slip op. 2; *Salfi*, 422 U.S. at 765; *Mathews* v. *Eldridge*, 424 U.S. 319, 330 (1976). The Court made clear in *Salfi* that the

requirement that the claimant obtain such a "final decision" is a "statutorily specified jurisdictional prerequisite" to suit under 42 U.S.C. 405(g). Accord, *Ringer*, slip op. 14. Thus, the text of Section 405(g), the governing regulations, and *Salfi* and its progeny foreclose respondents' assertion that a court may dispense with the exhaustion requirement based on its own case-by-case balancing of what it believes to be the relevant considerations.

Furthermore, Section 405(g) specifies that judicial review is available only "after a hearing." Such hearings are conducted by administrative law judges (ALJs) in the Department of Health and Human Services (HHS). Because the prior stages of the administrative review process are conducted by the state agency (see Pet. 3-5), it is the ALJ hearing stage that affords the Secretary her principal opportunity to apply her experience and expertise in the actual adjudication of a particular claim for benefits and to correct errors that might have occurred with respect to that claim at the state agency level.

In this case, for example, respondents challenged an interpretation of the regulations governing the assessment of a claimant's residual functional capacity (RFC) to work that had been conveyed by certain HHS personnel to the state agency in New York. However, respondents do not dispute that the ALJs were not bound by that particular interpretation. See Pet. 5; *Ringer*, slip op. 2. Accordingly, any class member whose claim for benefits had been denied at the state agency level as a result of that interpretation would have been entirely free to advocate a different interpretation to the ALJ. Respondents offer no reason why that class member should have been permitted to bypass this fully adequate administrative remedy to correct an alleged error in the interlocutory denial of his claim, and instead to

file suit directly in court. Congress plainly did not authorize such judicial interference with the administrative process.[1]

2. Respondents argue, however, that a claimant was not required to have obtained an ALJ and Appeals Council decision on his claim for benefits in order to be included in the class because this suit supposedly challenges only a "procedural" irregularity, not "substantive" standards of eligibility. See Br. in Opp. 15, 16. Respondents argue that under the interpretation of the RFC regulations followed by the state agency, a claimant whose mental impairment was not among those that are deemed to be disabling on medical grounds alone was "conclusively presumed" to have the RFC to engage in substantial gainful activity and thus not to be disabled (*id.* at 16), thereby depriving the claimant of an "individualized assessment" of his RFC and ability to work (*id.* at 18). Respondents further argue (*id.* at 15, 18, 20 & n.14) that, even if an individual claimant might later have been found by an ALJ or the Appeals Council to be disabled, an award of benefits at that point would not have vindicated their challenge to the procedure utilized by the state agency.

Respondents ignore the fact that this is precisely the argument that was rejected by the Court in *Ringer*. There, as here, the plaintiffs challenged instructions that were communicated by HHS to the entity responsible for adjudicating claims at the preliminary stages of the administrative review process, but that did not bind the ALJs and Appeals Council in HHS. Slip op. 3-4. There, as here, the plaintiffs

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[1]Of course, the unnamed class members in this case have not personally sought to short-circuit the administrative process in this manner. It is the handful of named plaintiffs who have sought to intrude the courts into the administrative proceedings involving the claims of these thousands of other individuals. The courts below required the Secretary to reopen and readjudicate those claims, whether or not the claimants involved so requested (Pet. App. 65a-66a).

contended that the instructions created a conclusive presumption of ineligibility, thereby depriving claimants of an individualized assessment of their eligibility. *Id.* at 8, 10, 13, 15. And there, as here, the plaintiffs sought to characterize their suit as only a challenge to a "procedural" irregularity rather than an actual claim for benefits, and they argued that an award of benefits by the ALJ or the Appeals Council would not vindicate their interest in procedural regularity. *Id.* at 7,9, 10-11. The Court nevertheless unanimously held that full exhaustion of administrative remedies was required because the claimants might have been awarded benefits in the course of further proceedings. *Id.* at 14-16; *id.* at 2 (Stevens, J., concurring and dissenting). *Ringer* thus squarely controls this case and requires reversal of the court of appeals' exhaustion holding.

3. Respondents argue in a related vein (Br. in Opp. 19) that the court of appeals correctly dispensed with the exhaustion requirement based on its own view that exhaustion would have been "futile" with regard to the particular legal issue they raise (see Pet. App. 15a). This argument ignores *Salfi*, which explicitly held that exhaustion "may *not* be dispensed with merely by a judicial conclusion of futility" (422 U.S. at 766 (emphasis added)). The Court so held in *Salfi* even though the Social Security Act itself barred the payment of benefits to a person in the plaintiff's position. There has been no suggestion here that exhaustion was futile in this sense for *any* of the class members: as respondents and the court of appeals concede (Br. in Opp. 15, 20; Pet. App. 15a), and as the experience of several of the named plaintiffs demonstrates (see Pet. 19 & n.8), many class members might well have obtained an award of benefits in the course of further administrative proceedings.

It follows *a fortiori* from *Salfi* that the court of appeals could not dispense with the exhaustion requirement on the basis of its perception that exhaustion would be futile only

with respect to a particular legal issue, even though not (as in *Salfi*) with respect to the substantive claim of entitlement to benefits. See *Ringer*, slip op. 15-16. This is so because the particular legal issue might drop out of any given claimant's case if he were found at a subsequent stage of the administrative review process to be either eligible or ineligible on some other ground.

4. Finally, respondents contend (Br. in Opp. 15-16, 18) that *Mathews* v. *Eldridge, supra*, supports the ad hoc balancing approach they advocate. This suggestion is completely without merit. The Court held in *Eldridge* that although the plaintiff had not fully exhausted his administrative remedies on the merits of his claim for benefits, the district court had jurisdiction under 42 U.S.C. 405(g) to entertain his suit contending that he had a due process right to an evidentiary hearing before his disability payments actually were stopped. The Court stressed, however, that the issue of the asserted constitutional right to a predetermination hearing was "entirely collateral" to the claimant's substantive claim of entitlement. 424 U.S. at 330. See also *Ringer*, slip op. 14 ("wholly collateral"). By contrast, the issue in this case—whether the state agency misapplied the relevant regulations in determining whether the claimant had sufficient RFC to be able to work—manifestly is not "entirely collateral" to the merits of a class member's claim for benefits. Nor is it even "substantially collateral," as respondents and the court of appeals believe (Br. in Opp. 18; Pet. App. 14a). That issue instead goes to the very heart of the state agency's decision on the merits of the question whether the claimant is disabled. Compare *Ringer*, slip op. 14-15.[2]

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[2]Moreover, contrary to respondents' contention (Br. in Opp. 16), the issue they raise—the asserted right of a claimant to an individualized assessment of his RFC—is clearly not one that would be lost if the claimant were required to exhaust his administrative remedies before seeking judicial review. As we have explained (see page 3, *supra*), the ALJs were not precluded from making such an individualized assessment; and if an ALJ failed to do so in a particular case (and if the Appeals Council did not correct that error), a court on judicial review could remand for a proper determination. By contrast, in *Eldridge*, the asserted right to a *pre*termination hearing would have been irretrievably lost if judicial consideration of that issue were postponed until after the payment of benefits had been terminated.

As we have pointed out in the certiorari petition (Pet. 23), the court of appeals' exhaustion holding in this regard squarely conflicts with the Fourth Circuit's decision in *Hyatt* v. *Heckler*, 757 F.2d 1455, 1460 (1985), petition for cert. filed, No. 85-474, which held that a court may dispense with the requirement of full exhaustion only where the particular legal issue involved is *wholly* collateral to the substantive claim of entitlement.[3] That conflict warrants resolution by this Court.

B. *The 60-Day Filing Requirement*

The court of appeals also held that the 60-day period within which an individual must file an action for judicial review under 42 U.S.C. 405(g) does not impose a jurisdictional limitation (Pet. App. 16a-17a) and that the running of the 60-day period was "effectively tolled" for each class member for as long as the challenged interpretation of the governing regulations "remained operative but undisclosed" (*id.* at 18a). We have explained in the certiorari petition (Pet. 24-25) that this holding cannot be reconciled with the established rule under this Court's decisions that

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[3]Contrary to respondents' contention (Br. in Opp. 27), the exhaustion ruling in *Hyatt* was not dependent upon the presence of a nonacquiescence issue in the case; nonacquiescence was not even mentioned in the court's discussion of exhaustion. The Seventh Circuit also recently adopted an exhaustion analysis similar to that announced by the Second Circuit in this case. *Johnson* v. *Heckler*, No. 85-1254 (July 30, 1985), slip op. 7-10. The Secretary has filed a petition for rehearing en banc in *Johnson*.

the terms of Congress's consent to suit (including the time within which a suit against the government may be brought) define the jurisdiction of the court. Respondents appear to concede the correctness of this general principle. See Br. in Opp. 22. They argue only that this principle is inapplicable here because Section 405(g) authorizes the Secretary to extend the 60-day suit-filing period. However, this feature of Section 405(g) undermines rather than supports their position.

The fact that Congress expressly vested only the Secretary with authority to extend the 60-day period in appropriate circumstances indicates that Congress deliberately *withheld* that power from the courts, and thus reinforces the application to Section 405(g) of the usual rule that a limitation on the time within which a suit may be brought is a jurisdictional condition that a court may not modify or extend. In this respect, the 60-day requirement is directly parallel to the exhaustion requirement in Section 405(g). This Court held in *Salfi* that a "final decision" of the Secretary is a jurisdictional prerequisite to suit that must be enforced by the courts, even though the Secretary (but not the court) has the authority in some circumstances to waive the exhaustion requirement and thereby enable a court to entertain a suit that otherwise would be barred. 422 U.S. at 766-767. The same is true of the court's jurisdictional obligation to enforce the 60-day rule where, as here, that period has not been extended by the Secretary.[4] Under the court of

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[4]Respondents' reliance (Br. in Opp. 22) on *Schacht* v. *United States*, 398 U.S. 58, 64 (1970), for the proposition that a court may extend the 60-day filing period in Section 405(g) is wholly misplaced. *Schacht* involved a rule of this Court that prescribed the time within which a petition for a writ of certiorari must be filed. The relevant statute (18 U.S.C. 3772), however, confers on this Court the authority to prescribe rules governing the time for filing certiorari petitions in criminal cases, without confining the Court's jurisdiction. By contrast, in 42 U.S.C. 405(g), Congress has conferred only on the Secretary, not the courts, the power to extend the time for filing suit. As a result, where the suit is not filed within the 60-day period Congress itself has allowed, Congress has conditioned the court's exercise of jurisdiction on the Secretary's extension of that period.

appeals' holding, however, whenever HHS's interpretation of a particular regulation later turns out to have been erroneous, the 60-day period would be tolled on a retroactive basis for hundreds or thousands of claimants for as long as that interpretation remained "undisclosed." Such a haphazard and sweeping principle of retroactive tolling would fatally undermine the interests in certainty and finality that Congress deemed to be of critical importance when it imposed the explicit 60-day limit on suits under 42 U.S.C. 405(g). *Califano* v. *Sanders*, 430 U.S. 99, 108 (1977).

The principal support respondents cite (see Br. in Opp. 24-25) for the court of appeals' tolling rule is *Barrett* v. *United States*, 689 F.2d 324 (2d Cir. 1982), cert. denied, 462 U.S. 1031 (1983). However, that case concerned the distinct question of when a cause of action "accrues" for purposes of the two-year limitations period in the Federal Tort Claims Act (28 U.S.C. 2401(b)). See *United States* v. *Kubrick*, 444 U.S. 111, 121-122 (1979). That issue has no relevance here. In 42 U.S.C. 405(g), Congress specified the precise time when the cause of action accrues: when the notice of the Secretary's "final decision" is mailed to the claimant. The claimant obviously will know from this notice that HHS has determined that he is not entitled to disability benefits. If the claimant disagrees with that finding, Section 405(g) requires that he file suit promptly to challenge the Secretary's decision. The fact that the Secretary's decision might have been based on a misinterpretation of a regulation does not delay the commencement of the 60-day period.

Finally, respondents try to limit the impact of the decision below by arguing (Br. in Opp. 25) that the 60-day period was tolled in this case only because the interpretation of the relevant regulations applied by the state agency was found to be "secretive" and "clandestine." However, the court of appeals did not premise its tolling of the 60-day period on a finding that HHS actively concealed the interpretation challenged in this suit (see Pet. App. 17a-18a), and neither the courts below nor respondents have pointed to any evidence of such concealment. See Pet. 26; Reply Memorandum for the Petitioners on Application for a Stay Pending Certiorari 9-10. Indeed, as respondents repeatedly acknowledge (Br. in Opp. 7, 8, 9), the State agency was fully aware of HHS's interpretation. Rather, the court of appeals held that the running of the 60-day period was tolled on a state-wide basis simply because the challenged interpretation was "undisclosed" (Pet. App. 18a). Moreover, three district court decisions have read the Second Circuit's decision to state such a broad tolling principle in Social Security class actions. See *New York* v. *Heckler*, 105 F.R.D. 118, 123-124 (S.D.N.Y. 1985); *Stieberger* v. *Heckler*, No. 84 Civ. 1302 (LBS) (S.D. N.Y. Aug. 19, 1985), slip op. 22-25; *Schisler* v. *Heckler*, Civ. 80-572E (W.D.N.Y. Dec. 5, 1984), slip op. 9-13. Thus, the decision below already is having ramifications far beyond this case.

As we have explained (Pet. 29), and as the court of appeals acknowledged (Pet. App. 17a), there is a conflict among the circuits on the question whether the 60-day filing period in 42 U.S.C. 405(g) is jurisdictional in nature. See also *Johnson* v. *Heckler*, slip op. 10-11. Contrary to respondents' assertion (Br. in Opp. 27-28), the Fourth Circuit has explicitly rejected the contention that the running of the 60-day period in 42 U.S.C. 405(g) may be tolled by a court. See *Hunt* v. *Schweiker*, 685 F.2d 121 (1982). This conflict warrants resolution by this Court.

For the foregoing reasons and the additional reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Acting Solicitor General

SEPTEMBER 1985

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PETITIONER'S

BRIEF

Supreme Court, U.S.
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No. 84-1923

In the Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

This is a class action brought pursuant to 42 U.S.C. 405(g) on behalf of applicants for and recipients of Social Security disability benefits in New York. The plaintiffs challenged an interpretation of applicable regulations that was conveyed by certain personnel of the Social Security Administration to the state agency responsible for the initial review of claims for disability benefits.

The questions presented are:

1. Whether, in light of the provision in 42 U.S.C. 405(g) that an individual may obtain judicial review only "after a final decision of the Secretary made after a hearing to which he was a party," the district court correctly included within the class numerous claimants who had not received a "final decision" of the Secretary on their individual claims for benefits.

2. Whether, in light of the requirement of 42 U.S.C. 405(g) that a claimant must seek judicial review within 60 days of the Secretary's final decision, the district court correctly included within the class numerous claimants who had received a final decision on their individual claims for benefits more than 60 days before this class action was filed.

3. Whether, if the district court did not have jurisdiction under 42 U.S.C. 405(g) over the claims of those class members who had received a final decision more than 60 days before this class action was filed, the court nevertheless could exercise mandamus jurisdiction under 28 U.S.C. 1361 to require the Secretary to reopen and readjudicate those claims.

PARTIES TO THE PROCEEDINGS

The petitioners are Margaret M. Heckler, Secretary of Health and Human Services, and Martha McSteen, the Acting Commissioner of Social Security.

The eight individual respondents are Jane Does I-III and Richard Roes I-V. These eight respondents are representatives of the following class certified by the district court (Pet. App. 65a):

> All individuals residing in the State of New York who have applied for or received Title II and/or Title XVI benefits and who, between April 1, 1980 and May 15, 1983, were found by the New York State Office of Disability Determinations to have a functional psychotic or functional non-psychotic mental impairment which is severe (i.e., determined under 20 C.F.R. § 404.1520(c) or § 416.930(c) to require evaluation under Appendix I of that Regulation), and whose applications for benefits have been denied or whose benefits have been or will be terminated, on the basis of defendants' determination that such persons are capable of substantial gainful activity.

The governmental respondents are the City of New York, the New York City Health and Hospitals Corporation, the State of New York, the Commissioner of the New York State Department of Social Services, and the Commissioner of the New York State Office of Mental Health.

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v.

CITY OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 742 F.2d 729, and the opinion of the court of appeals denying the Secretary's petition for rehearing (Pet. App. 24a-29a) is reported at 755 F.2d 31. The opinion of the district court (Pet. App. 30a-63a) is reported at 578 F. Supp. 1109.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1984, and a petition for rehearing was denied on February 7, 1985 (Pet. App. 24a-29a). By order dated April 29, 1985, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including June 7, 1985, and the petition was filed on that date. The petition for a writ of certiorari was granted on October 7, 1985 (J.A. 337). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 205(g) of the Social Security Act, 42 U.S.C. 405(g); Section 5 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1801; and 20 C.F.R. 404.1520 are reproduced at App., *infra*, 1a-7a.

STATEMENT

This is a class action brought on behalf of New York residents challenging the interpretation by certain Social Security Administration (SSA) personnel of several regulations that implement the substantive standards of eligibility for disability benefits under Title II and Title XVI of the Social Security Act. The merits of the dispute are not at issue here. Instead, we have sought review of the court of appeals' affirmance of the district court's sweeping judgment that: (i) awarded relief to class members who were still in the process of exhausting their administrative remedies when that judgment was entered; and (ii) ordered the Secretary to reopen administrative decisions denying the claims of thousands of other class members that had become final and binding when the claimants involved failed to seek further administrative review or judicial review within 60 days.

A. The Statutory And Regulatory Framework

Title II of the Social Security Act provides, inter alia, for the payment of disability insurance benefits to persons whose disability prevents them from pursuing gainful employment. 42 U.S.C. (& Supp. I) 423. Disability benefits also are payable under the Supplemental Security Income (SSI) Program established by Title XVI of the Act. 42 U.S.C. 1382(a). "The disability programs administered under Titles II and XVI 'are of a size and extent difficult to comprehend.' *Richardson* v. *Perales*, 402 U.S. 389, 399 (1971). Approximately two million disability claims were filed under these two titles in fiscal year 1983." *Heckler* v. *Day*, No. 82-1371 (May 22, 1984), slip op. 2 (footnote omitted). The Secretary of Health and Human Services has promulgated detailed regulations governing both the procedures for the adjudication of claims for benefits and the substantive standards of eligibility under these massive programs.

1. *Procedural Provisions*

"To facilitate the orderly and sympathetic administration of the disability program[s] * * *, the Secretary and Congress have established an unusually protective * * * process for the review and adjudication of disputed claims." *Heckler* v. *Day*, slip op. 2. If it is determined at any stage of this process that the individual is eligible for benefits (and if he has not been receiving benefits (see page 5, *infra*)), he is entitled to retroactive payments for the period of his eligibility. See *Mathews* v. *Eldridge*, 424 U.S. 319, 339 (1976).

a. Congress has directed that the determination whether an individual is under a disability shall be made in the first instance by a state agency, pursuant to regulations, guidelines, and performance standards established by the Secretary through SSA. 42 U.S.C. 421(a), 1383b(a); 20 C.F.R. 404.1503, 416.903. See *Eldridge*, 424 U.S. at 335; *Day*, slip op. 2, 12. The furnishing of such guidance to the state agencies is the responsibility of SSA's Office of Operational Policies and Procedures. The first stage of the administrative review process is the initial determination, which the state agency renders on the basis of its consideration of an application submitted by a person seeking benefits for the first time or its reassessment of a person who already is receiving benefits. See *Eldridge*, 424 U.S. at 337-338.

b. If the state agency makes an initial determination that a new applicant is not disabled or that the disability of a current recipient has ceased, the individual may request a de novo reconsideration by the state agency. 20 C.F.R. 404.904, 404.907-404.921, 416.1405, 416.1407-416.1421.[1] Governing regulations provide—and the claim-

[1] The Secretary has not provided for a separate reconsideration stage in disability cessation cases under Title XVI. An SSI recipient therefore is entitled to an ALJ hearing if he requests one within 60 days of the initial determination. 20 C.F.R. 416.1407, 416.1415. See J.A. 61, 65.

ant is personally notified (see, *e.g.*, J.A. 86)—that he must request reconsideration within 60 days of his receipt of the adverse initial determination. 20 C.F.R. 404.904, 404.909(a)(1), 416.1404, 416.1409(a). If the claimant does not do so, the adverse initial determination becomes "binding" upon him. 20 C.F.R. 404.905, 416.1405.

c. Under 42 U.S.C. 421(d), if an individual is dissatisfied with the decision by the state agency after its initial determination and reconsideration of the claim, he "shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in [42 U.S.C. 405(b)]." See also 42 U.S.C. 1383(c)(1); 20 C.F.R. 404.944-404.965, 416.1429-416.1465. The Act requires—and the claimant is personally notified (see, *e.g.*, J.A. 88-91, 103, 116, 136, 141, 149)—that he must request such a hearing within 60 days of his receipt of the state agency's determination (42 U.S.C. (Supp. I) 405(b)(1); 42 U.S.C. 1383(c)(1)), and the state agency's decision becomes binding upon the claimant if he does not do so. 20 C.F.R. 404.920(a), 404.921, 404.933(b), 416.1404(b)(3), 416.1405, 416.1420(a), 416.1421, 416.1433(b).

The evidentiary hearing is conducted by an administrative law judge (ALJ) within SSA's separate Office of Hearings and Appeals (20 C.F.R. 404.929, 416.1429, 422.201 *et seq.*). The ALJ is directed to "look[] fully into the issues" (20 C.F.R. 404.944, 416.1444). See *Heckler* v. *Campbell*, 461 U.S. 458, 469 n.12 (1983). Either the claimant or the ALJ may develop new evidence or raise new issues that were not presented to the state agency, and the claimant or his representative has a right to make an oral or written statement regarding the facts and applicable law. 20 C.F.R. 404.929, 404.944, 404.946, 404.949, 404.950, 416.1429, 416.1444, 416.1446, 416.1449, 416.1450. In rendering his decision, the ALJ must follow SSA's published regulations and formal Social Security Rulings (SSRs) (20 C.F.R. 422.408), but he is not bound by the Programs Operations Manual System (POMs) and other instructional material that SSA's Office of Operational Policies and Procedures furnishes to the state agencies to guide them in their preliminary evaluation of disability claims. See *Heckler* v. *Ringer*, No. 82-1772 May 14, 1984), slip op. 2; S. Rep. 98-466, 98th Cong., 2d Sess. 18-19 (1984); H.R. Rep. 98-618, 98th Cong., 2d Sess. 20-22 (1984).

Because eligibility for SSI benefits is based on need (42 U.S.C. 1382(a)), the Secretary implemented this Court's decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), by providing that an individual who has been receiving SSI benefits under Title XVI may elect to continue to receive those benefits from the date of the state agency's determination that he no longer is disabled until the ALJ has rendered his decision. 20 C.F.R. 416.1336(b). By contrast, the Court held in *Eldridge* that in the case of disability benefits under Title II, which are not based on need, the Due Process Clause does not require the Secretary to continue payments until the individual has had an opportunity for an ALJ hearing in SSA. 424 U.S. at 339-349.

Notwithstanding *Eldridge*, Congress enacted temporary legislation in 1982 permitting the claimant in a Title II disability cessation case to elect to continue to receive benefits pending receipt of the ALJ's decision, subject to recoupment if the ALJ affirms the state agency's determination. 42 U.S.C. 423(g), as added by Pub. L. No. 97-455, § 2, 96 Stat. 2498. In the Social Security Disability Benefits Reform Act of 1984, Congress extended this interim benefits authorization under Title II until January 1, 1988. Pub. L. No. 98-460, § 7, 98 Stat. 1803. By contrast, Congress has not provided any similar authorization for the payment of benefits pending the ALJ's decision in a case involving a new applicant who was found by the state agency not to be disabled.

d. If the decision by the ALJ after a hearing under either Title II or Title XVI is adverse to the claimant, he then may seek review by the Appeals Council in SSA. 20 C.F.R. 404.967-404.983, 416.1467-416.1483. Governing regulations provide that if the claimant does not seek

Appeals Council review within 60 days or such further period as the Secretary permits, the adverse ALJ's decision becomes binding. 20 C.F.R. 404.955(a), 404.968(a)(1), 416.1455(a), 416.1468. Once again, the claimant is specifically informed that he must seek review within 60 days (see, *e.g.*, J.A. 70, 93, 120, 151).

e. After the Appeals Council has either denied review of the ALJ's decision or has granted review and rendered its own decision, the Secretary has rendered her "final decision" on the individual's claim for benefits. Only then do the Act and implementing regulations provide for the claimant to seek judicial review in federal district court, pursuant to 42 U.S.C. 405(g). See 42 U.S.C. 421(d), 1383(c)(3); 20 C.F.R. 404.900(a)(5), 404.981, 416.1400(a)(5), 416.1481, 422.210. Section 405(g) requires that the claimant seek such review "within sixty days after the mailing to him of notice of [the final] decision or within such further time as the Secretary may allow." The notice of the Appeals Council's decision informs the claimant of this requirement (see, *e.g.*, J.A. 83, 127, 157). If judicial review is not sought within the time allowed, the Appeals Council's decision (or the ALJ's decision, if the Appeals Council denied review) is expressly made binding upon the claimant. 20 C.F.R. 404.981, 404.982, 416.1481, 416.1482.

f. Although an adverse decision at any step of the administrative process becomes binding upon the claimant if he does not seek further review within the time allowed, the Secretary has provided by regulation that such a decision may be reopened within 12 months for any reason (see, *e.g.*, J.A. 128), within either two or four years for good cause, and at any time if the decision was obtained by fraud or similar fault. 20 C.F.R. 404.987-404.989, 416.1487-416.1489. However, the Secretary's denial of a request to reopen is not subject to administrative or judicial review. 20 C.F.R. 404.903(*l*), 416.1403(a)(5). See *Califano* v. *Sanders*, 430 U.S. 99, 108 (1977).

2. *Substantive Provisions*

Under Title II and Title XVI of the Social Security Act, a person is entitled to disability benefits only if he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. 423(d)(1)(A), 1382c(a)(3)(A). The Act further provides that an individual shall be determined to be under a disability "only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy * * *." 42 U.S.C. (Supp. I) 423(d)(2)(A); 42 U.S.C. 1382c(a)(3)(B). In 1978, the Secretary promulgated regulations implementing these statutory definitions of the term "disability." *Campbell*, 461 U.S. at 461. See 20 C.F.R. Pt. 404, Subpt. P.; *id.* Pt. 416, Subpt. I. Those regulations establish a five-step "sequential evaluation" approach for determining whether a person is disabled.

At the first step, the state agency employee or the ALJ determines whether the claimant is engaged in work that constitutes substantial gainful activity. If so, the claimant will be found not to be disabled, and the sequential evaluation process goes no further. 20 C.F.R. 404.1520(b), 416.920(b). If the claimant is not engaged in substantial gainful activity, the decision-maker then determines at step two whether the claimant's impairment is "severe"—*i.e.*, whether it limits his "physical or mental ability to do basic work activities" (20 C.F.R. 404.1520(c), 404.1521, 416.920(c), 416.921). This determination is principally a medical assessment, without consideration of the claimant's age, education, or work experience. If the impairment is not medically "severe," the claimant is found not to be disabled. However, if the impairment is severe, the decision-maker next determines

whether it is equal in severity to the most serious sorts of impairments, which are listed in the regulations and deemed to be disabling without the need to consider the claimant's age, education, and work experience. 20 C.F.R. 404.1520(d), 416.920(d). If so, the claimant is found to be disabled at that step.

If the claimant's impairment does not meet or equal the listings, step four of the sequential evaluation process provides for the decision-maker to determine the claimant's "residual functional capacity" (RFC)—*i.e.*, the mental or physical abilities that the claimant retains despite his impairment. In the case of a mental impairment, the relevant factors include the claimant's "ability to understand, to carry out and remember instructions, and to respond appropriately to supervision, co-workers and work pressures in a work setting." 20 C.F.R. 404.1545(c), 416.945(c). The decision-maker then must determine whether the claimant has a sufficient RFC to enable him to do his past work. If he can, he is found not to be disabled. 20 C.F.R. 404.1520(e), 416.920(e). If the claimant cannot do his past work, the decision-maker than proceeds at step five to consider the claimant's RFC and the vocational factors of age, education, and work experience in order to determine whether the claimant can do other jobs that exist in the national economy. 20 C.F.R. 404.1520(f), 416.920(f). This determination ordinarily is made by reference to the medical-vocational guidelines, which set forth rules to identify whether jobs requiring specific combinations of attributes exist in the national economy. 20 C.F.R. Pt. 404, Subpt. P, App. 2. See generally *Campbell*, 461 U.S. at 460-462, 467-468; Pet. App. 3a, 32a-33a.

B. The Proceedings In This Case

1. a. This class action was filed in the United States District Court for the Eastern District of New York on February 8, 1983 (J.A. 1). An amended complaint was filed on October 17, 1983 (J.A. 4). The named plaintiffs were eight individuals (Jane Does I-III and Richard Roes I-V) who had received or applied for disability benefits

under Title II or Title XVI of the Social Security Act (J.A. 19-24), as well as the City of New York, the New York City Health and Hospitals Corporation, the State of New York, and two state officials (J.A. 18-19).

The plaintiffs, respondents herein, challenged an interpretation of the sequential evaluation regulations given by certain SSA personnel to the state agency responsible for making disability determinations in New York (J.A. 30-35). Respondents referred to a Regional SSA Program Circular and several other SSA memoranda stating that if a claimant's mental impairment is found at step three not to meet or equal the listings of the most severe impairments, it will "generally follow" that the claimant has the RFC at least for unskilled work and that a finding of disability at step four or five, while "possible," is "rare" (J.A. 30-31, 43-51). Respondents contended that the approach indicated by these memoranda and other materials gave "improper weight" to the fact that the claimant's impairment did not meet or equal the severity listings and that it in effect created a "presumption" that the claimant was able to do unskilled work, without an adequate individualized evaluation of his capacity to engage in substantial gainful activity. In respondents' view, such an evaluation should consider such factors as the claimant's recent prior work history, his reaction to stressful situations, the risk and effect of a possible recurrence of symptoms, and his performance in a work-like setting (J.A. 32-38).

b. Before this suit was filed, another district court had granted a preliminary injunction in a class action raising a similar challenge. *Mental Health Association of Minnesota* v. *Schweiker*, 554 F. Supp. 157 (D. Minn. 1982), aff'd, 720 F.2d 965 (8th Cir. 1983). In response to that suit, the Commissioner of Social Security, on January 3, 1983, sent a memorandum to all SSA Regional Commissioners, all SSA field assessment officers, and all state agencies that make disability determinations (DX M; Pet. App. 69a-70a; Tr. 28). The Commissioner's memorandum made clear that a finding that a claimant is able to engage in substantial gainful activity *cannot*

be justified solely on the basis of a finding at step three of the sequential evaluation process that his mental impairment does not meet or equal the listings. Instead, the memorandum stressed that under existing regulations and POMS instructions, the sequential evaluation process must continue to a consideration of the claimant's RFC and vocational factors at steps four and five. The Commissioner's memorandum instructed the Regional Commissioners and SSA field assessment officers to work with state agency administrators "immediately" in order "to assure that these principles are reviewed with every adjudicator" (*id.* at 69a).

c. The district court rendered its decision on January 11, 1984 (Pet. App. 30a), more than a year after the Commissioner sent the corrective instructions just discussed. The court acknowledged that the challenged interpretation of the regulations was no longer being applied (*id.* at 39a). But the court nevertheless chose to address that interpretation, found it contrary to the Act and regulations, and ordered broad relief to the members of the certified class (*id.* at 31a-42a, 60a-63a). That class consists of all New York residents who, between April 1, 1980 and May 15, 1983, were found by the state agency to have a severe functional psychotic or non-psychotic mental impairment that did not meet or equal the listings, and whose applications were denied or benefits were terminated because of a determination that they were capable of performing substantial gainful activity (*id.* at 65a).

The district court rejected the Secretary's contention that it could not include within the class under 42 U.S.C. 405(g) any persons who had not exhausted their administrative remedies or sought judicial review within 60 days of the Secretary's final decision denying their individual claims for benefits (Pet. App. 43a-46a, 59a-60a). As relief, the court ordered the Secretary to reopen all adverse administrative decisions affecting the class members, although it provided that any class member who had an appeal pending before an ALJ or the Appeals Council could proceed with that appeal (*id.* at 65a-66a).

2. a. The court of appeals affirmed, rejecting the Secretary's jurisdictional arguments (Pet. App. 1a-23a). The court conceded that the Secretary had not waived the requirement that a claimant exhaust his administrative remedies through the Appeals Council stage in order to obtain a "final decision" subject to judicial review under 42 U.S.C. 405(g). But the court granted a "judicial waiver" of that requirement pursuant to what it termed a "general approach" to the exhaustion question, under which "no one factor is critical" and a court may "balanc[e] the competing considerations to arrive at a just result under the circumstances presented" (Pet. App. 13a).

Applying its balancing approach, the court of appeals acknowledged that the class members' argument that the Secretary had failed to assess their RFC on an individualized basis was not "entirely" collateral to their claims for benefits, as this Court had required in *Eldridge*, 424 U.S. at 330, and *Ringer*, slip op. 14 (Pet. App. 14a). But the court distinguished *Ringer* on the ground that it involved a challenge to "substantive standards," while this case involved what the court characterized as a "procedural irregularity" (Pet. App. 14a). The court also believed that exhaustion should not be required because it would be "futile," even though some individual class members could have prevailed on their claims for benefits if they had pursued administrative appeals (*id.* at 15a). The court reasoned that the assertedly "procedural right" to an individualized assessment of RFC could not be vindicated in such an appeal (*ibid.*) and that a claimant should not have to undergo the "ordeal" of pursuing his administrative remedies (*id.* at 14a). The court added that it saw no reason to require exhaustion in order to allow SSA to apply its "'experience and expertise'" and "'correct its own errors'" (*id.* at 15a, quoting *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975)) —despite the fact that the Commissioner of Social Security already had corrected the agency's error before this suit was filed (see pages 9-10, *supra*).

b. Although 42 U.S.C. 405(g) requires that a claimant seek judicial review within 60 days of the Secretary's "final decision" on his own claim for benefits, the court of appeals further held that this action could be pursued on behalf of any class member who was found by the state agency not to be disabled at any time on or after April 1, 1980—almost three years before this suit was filed (Pet. App. 15a-18a). The court reasoned that the running of the 60-day filing period should be deemed to have been "tolled" for all affected claimants in New York during the time that the challenged presumption concerning RFC "remained operative but undisclosed" (*id.* at 18a).

The court of appeals conceded that the individual class members knew of the denial or loss of their benefits (notice of which triggers the running of the 60-day filing period under 42 U.S.C. 405(g)). But the court excused all of the class members from complying with the 60-day requirement on the ground that the claimants did not know that the denial of their claims was based on a systematic "procedural irregularity" that rendered them "subject to court challenge" (Pet. App. 18a). In the alternative, the court of appeals held that even if the district court did not have jurisdiction over these time-barred claims under 42 U.S.C. 405(g), it could require the reopening of those claims through the exercise of mandamus jurisdiction under 28 U.S.C. 1361 (Pet. App. 19a-20a).[2]

SUMMARY OF ARGUMENT

I. A. The court of appeals had no authority to excuse the procedural default of the thousands of class members who did not exhaust their administrative remedies. The existence of the "final decision" required by 42 U.S.C.

[2] After the court of appeals affirmed the district court's judgment and denied the Secretary's petition for rehearing, it declined to continue, pending certiorari, the partial stay that had been entered by the district court (see Pet. App. 67a-68a). However, this Court, by order dated July 1, 1985, granted the Secretary's application for reinstatement of that partial stay. No. A-972.

405(g) is a "statutorily specified jurisdictional prerequisite" to suit. *Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975). Since the enactment of Section 405(g) in 1939, governing regulations have provided that a decision of the Appeals Council is the Secretary's "final decision" on an individual's claim for benefits. Thus, each class member in this case was required to request an ALJ and the Appeals Council to correct any errors committed by the state agency before requesting a court to do so.

B. The court of appeals completely disregarded this firmly entrenched limitation on the exercise of subject matter jurisdiction under 42 U.S.C. 405(g) by holding that a court may grant a "judicial waiver" of the exhaustion requirement on a case-by-case basis. This ad hoc balancing approach would be totally unworkable in the vast Social Security programs, in which millions of claims for benefits and thousands of actions for judicial review are filed annually. *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), slip op. 23.

Furthermore, each of the factors the court of appeals weighed in the balance was beyond its province to consider. The court's reliance on its own assessment that exhaustion would be futile cannot be reconciled with the holding in *Salfi* that a "final decision" is a jurisdictional prerequisite that "may *not* be dispensed with merely by a judicial conclusion of futility" (422 U.S. at 766 (emphasis added)). The court's notion that exhaustion could be dispensed with because it believed that some unspecified number of class members otherwise would experience hardship ignores the fact that Congress mandated a uniform exhaustion rule, rather than an individualized jurisdictional inquiry, based on its own categorical balancing of individual hardship against the need to prevent premature judicial intervention in the administrative process. Finally, the court's view that exhaustion was unnecessary because respondents raised only a "procedural" challenge was rejected in *Ringer*, slip op. 14-16.

The ALJ and Appeals Council stages, which the class members in this case were permitted to ignore, furnish

the Secretary with her principal opportunity to apply her expertise and correct errors by the state agency. In fact, that is exactly what happened in the case of the eight named plaintiffs, three of whom were found by the ALJ to be disabled, and the remaining five of whom were found not to be disabled for reasons unrelated to the presumption that respondents alleged had been applied by the state agency. Moreover, the court of appeals' dispensing with exhaustion was egregiously disruptive of sound administration insofar as it affected the claims of thousands of unnamed class members. Each of those claimants knowingly abandoned his own individual claim for benefits when he was personally notified of his right to seek further administrative review within 60 days but declined to do so. There was no justification for the court of appeals to require the Secretary to divert her scarce resources to reopen those closed cases.

C. The only exception to the requirement under 42 U.S.C. 405(g) that there be a final administrative judgment on the claim for benefits applies to wholly "collateral" matters. This exception was recognized in *Mathews* v. *Eldridge*, 424 U.S. 319, 330-332 (1976), and the factors upon which the Court relied precisely parallel the three-part test for application of the collateral order exception to the final judgment rule under 28 U.S.C. 1291 and *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547 (1949). See, *e.g.*, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). Respondent's challenge to the alleged use by the state agency of a presumption in the assessment of RFC failed to satisfy any part of that test. First, the state agency did not "conclusively determine the disputed question," since the ALJs and Appeals Council concededly were not required to apply such a presumption. Second, this challenge was directly related to, not "completely separate from the merits" of, their claims for benefits. Third, any objection to the manner in which any individual class member's RFC was assessed was not "effectively unreviewable on appeal from a final judgment." Courts routinely review such objections after the Appeals Council has ruled.

II. A. The courts below also clearly erred in including in the class anyone who received a final decision more than 60 days before this suit was filed, because 42 U.S.C. 405(g) provides that a claimant must seek judicial review "within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow." There is no indication that any of the time-barred class members invoked the procedures under the Secretary's regulations for extending the 60-day period upon written request and a showing of "good cause." Like the requirement of a "final decision," compliance with the 60-day filing requirement that appears in the same sentence of Section 405(g) is a jurisdictional prerequisite to suit that may not be dispensed with by a court. The jurisdictional nature of such limitations on suits against the government is of long standing, and there is no indication that Congress intended to depart from that rule when it enacted Section 405(g).

Even if the 60-day filing requirement is not strictly jurisdictional, such limitations must be strictly construed and are not subject to judicial tolling. The court of appeals nevertheless sustained the district court's exercise of jurisdiction on the theory that the running of the 60-day filing period was "effectively tolled" on a state-wide basis during the time that the challenged presumption concerning the assessment of RFC was "undisclosed" (Pet. App. 17a-18a). This sweeping tolling rule is particularly objectionable, because it would retroactively toll the running of the 60-day period on a class-wide basis whenever an interpretation of the Act or regulations that was contained in an internal memorandum later turns out to have been erroneous. That result would broadly frustrate the congressional purpose embodied in Section 405(g) "to forestall repetitive or belated litigation of state eligibility claims." *Califano* v. *Sanders*, 430 U.S. 99, 108 (1977).

B. The jurisdictional limitations imposed by 42 U.S.C. 405(g) cannot be avoided by resort to mandamus jurisdiction under 28 U.S.C. 1361. The second sentence of 42

U.S.C. 405(g) bars judicial review of the Secretary's decisions except as provided in Section 405(g), and therefore necessarily forecloses review by way of mandamus. Mandamus relief is unavailable in this case in any event because (i) the time-barred class members had an adequate remedy under Section 405(g), (ii) the Secretary's determination of a claimant's disability is discretionary in nature, and (iii) the Secretary has no mandatory duty to reopen claims after the 60-day period for judicial review has expired.

ARGUMENT

THE DISTRICT COURT DID NOT HAVE JURISDICTION UNDER 42 U.S.C. 405(g) OVER THE CLAIM OF ANY CLASS MEMBER WHO DID NOT FULLY EXHAUST HIS ADMINISTRATIVE REMEDIES AND OBTAIN JUDICIAL REVIEW WITHIN 60 DAYS OF THE SECRETARY'S "FINAL DECISION" ON HIS CLAIM FOR BENEFITS

Congress has granted only a limited right of judicial review to persons seeking benefits under the Social Security Act. That right is conferred by 42 U.S.C. 405(g), which vests jurisdiction in the district courts and provides in relevant part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow.

If the individual has not satisfied the straightforward prerequisites to suit set forth in this Section, the court has no authority to entertain his action for judicial review. Moreover, this Court repeatedly has held that a class may be certified in an action arising under the Social Security Act only if *each* of the class members *individually* satisfies the requirements prescribed by 42 U.S.C. 405(g). *Califano* v. *Yamasaki*, 442 U.S. 682, 701, 704 (1979); *Mathews* v. *Diaz*, 426 U.S. 67, 71 n.3

(1976); *Weinberger* v. *Salfi*, 422 U.S. 749, 764 (1975). See also *Heckler* v. *Lopez*, 464 U.S. 879, 881 (1983) (Stevens, J., dissenting in part).

Despite these settled rules, the court of appeals held in this case that the district court correctly included within the class thousands of claimants who did not obtain the requisite "final decision" of the Secretary or seek judicial review within 60 days of that final decision. In place of the clear-cut exhaustion rule, the court of appeals sustained an ad hoc "balancing" approach that allows a court to dispense with exhaustion if necessary to achieve what the court deems to be a "just result" (Pet. App. 13a). The court further held that the explicit 60-day filing requirement may be ignored on a class-wide basis whenever an interpretation of applicable regulations contained in internal memoranda later turns out to have been erroneous.

The flagrant disregard for the "final decision" and 60-day filing requirements in 42 U.S.C. 405(g) exhibited by the jurisdictional holdings in this and other massive class actions under the Social Security disability programs[3] threatens to make chaos of the administrative mechanism established by the Act and implementing regulations for the orderly processing of millions of claims annually. Congress and the Secretary have established reasonable procedural requirements that must be followed in order for an individual to obtain administrative and judicial review of his claim, and each claimant is personally informed at each stage what those requirement are. The review process can function in the fair and efficient manner Congress intended only if those procedural rules are respected by the courts.

By contrast, the adjudicatory system would break down —and the courts would be flooded with cases seeking peremptory judicial intervention—if a claimant could obtain piecemeal interlocutory review every time he dis-

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[3] See, *e.g.*, *Polaski* v. *Heckler*, 751 F.2d 943 (8th Cir. 1984), petition for cert. pending, No. 85-55; *Johnson* v. *Heckler*, 769 F.2d 1202 (7th Cir. 1985).

agreed with the manner in which a particular issue was addressed at a preliminary stage of the administrative review process. Similarly, the repose that is established whenever a claimant fails to seek further review within 60 days would be fatally undermined if the courts could excuse that procedural default months or years later, as the courts below did in this case. These consequences are particularly intolerable when the courts ignore the controlling procedural rules in class actions involving thousands of claimants, most of whom had long since abandoned their own individual claims. As this Court recently observed (*Baldwin County Welcome Center* v. *Brown*, No. 83-181 (Apr. 16, 1984), slip op. 5):

> Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. As we stated in *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 826 (1980), "[I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."

The court of appeals failed to respect that admonition here.

I. THERE IS NO RIGHT OF JUDICIAL REVIEW UNDER 42 U.S.C. 405(g) PRIOR TO FULL EXHAUSTION OF ADMINISTRATIVE REMEDIES UNLESS THE CLAIMANT RAISES AN ISSUE FALLING WITHIN THE NARROW EXCEPTION FOR WHOLLY "COLLATERAL" MATTERS

Under 42 U.S.C. 405(g), an individual may obtain judicial review only "after [the] final decision of the Secretary made after a hearing to which he was a party." This Court has held that the existence of such a "final decision" is "central to the requisite grant of subject-matter jurisdiction." *Weinberger* v. *Salfi*, 422 U.S. 749, 764 (1975); accord *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), slip op. 14. For this reason,

and because the "final decision" requirement is an explicit limitation on Congress's waiver of sovereign immunity, compliance with that requirement is a "statutorily specified jurisdictional prerequisite" to suit that may not be dispensed with by a court. *Salfi*, 422 U.S. at 766. Compare *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981).

The named respondents brought this suit on behalf of a class of Social Security disability claimants in New York to challenge the state agency's decisions that their mental impairments did not render them disabled within the meaning of the Social Security Act. Respondents contend that in rendering those decisions, the state agency misapplied the regulations promulgated by the Secretary to implement the statutory definition of the term "disability." However, the Act and implementing regulations unambiguously required that each individual class member first request an ALJ and the Appeals Council to correct any errors committed by the state agency before requesting a court to do so.

A. Only A Decision By The Appeals Council Is A "Final Decision" Of The Secretary On The Individual's Claim For Benefits

1. Congress has not prescribed in detail when a decision of the Secretary should be regarded as "final" for purposes of judicial review. It has, however, imposed one critical precondition: Section 405(g) provides that a decision is "final" only if it was rendered "after a hearing." To be sure, the Court held in *Salfi* that the Secretary may dispense with the hearing requirement under 42 U.S.C. 405(b) and deem an otherwise interlocutory denial of the claim for benefits at the reconsideration stage as her "final decision" in certain limited circumstances. 422 U.S. at 765-767; see note 4, *infra*. But where the Secretary has not concluded that a hearing on the claim is unnecesasry, the phrase "after a hearing" in 42 U.S.C. 405(g) makes clear that any factual issues must be definitively resolved and the law must be definitively applied by the Secretary before ju-

dicial review is available. In other words, Congress has provided for judicial review only of the Secretary's final administrative *judgment* in the case.

This is the interpretation that has been given to the identical term "final decisions" in 28 U.S.C. 1291, which confers jurisdiction on the courts of appeals. Under Section 1291, a "final decision" of the district court is one "disposing of the whole case, and adjudicating all rights" —"one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 373 (1981). Compare *Bell* v. *New Jersey*, 461 U.S. 773, 779 (1983). That was the settled interpretation of the term "final decision" in the predecessor to 28 U.S.C. 1291 (see 28 U.S.C. (1934 ed.) 225) when 42 U.S.C. 405(g) was enacted in 1939 (Act of Aug. 10, 1939, ch. 666, § 201, 53 Stat. 1370-1371). See *Berman* v. *United States*, 302 U.S. 211, 212-213 (1937); *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940). It is reasonable to presume that when Congress used the familiar term "final decision" in Section 405(g), it intended the term to be given a parallel construction in defining the district courts' jurisdiction to review the Secretary's decisions under the Social Security Act. *Lindahl* v. *OPM*, No. 83-5954 (Mar. 20, 1985), slip op. 12 & n.15; *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 378-382 (1982). Accordingly, it is only the Secretary's order that finally disposes of the claim at the administrative level that is subject to judicial review under 42 U.S.C. 405(g)—at least in the absence of a wholly collateral issue that is subject to immediate judicial review under the rationale of *Eldridge* and *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547 (1949). See pages 35-39, *infra*.

2. There can be no doubt about what constitutes the Secretary's final judgment on a claim for benefits under the administrative review procedure that Congress and the Secretary have established. Except for the condi-

tion that judicial review is available only "after a hearing," Congress has "left to the Secretary to flesh out by regulation" what constitutes the "final decision" that terminates all administrative proceedings on a particular claim and triggers the right of judicial review. *Salfi*, 422 U.S. at 766 & n.9. "The statutory scheme is thus one in which the Secretary may specify such requirements for exhaustion as [s]he deems serve [her] own interests in effective and efficient administration" (*ibid.*). Accord *Ringer*, slip op. 2-3, 16; *Eldridge*, 424 U.S. at 330.

Consistent with these principles and "[p]ursuant to her rulemaking authority [under 42 U.S.C. 405(a)], the Secretary has provided that a 'final decision' is rendered on a * * * claim only after the individual claimant has pressed his claim through all designated levels of administrative review" (*Ringer*, slip op. 2 (footnote omitted); see also *Salfi*, 422 U.S. at 765)—*i.e.*, only after the Appeals Council has either denied the claimant's request for review or granted that request and issued its own decision. 20 C.F.R. 404.900(a)(5), 404.981, 416.1400(a)(5), 416.1481.[4] This requirement has been embodied in the regulations governing review of Social Security claims since 42 U.S.C. 405(g) was enacted,[5]

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[4] The Secretary has adopted only one exception to the requirement that the claimant fully exhaust his remedies through the Appeals Council stage. That exception applies where the claimant challenges the constitutionality of a provision of the Social Security Act and the Secretary determines after the reconsideration stage that there are no other disputed questions of fact or law that bear on the claim. See 20 C.F.R. 404.923-404.928, 416.1423-416.1428; *Ringer*, slip op. 2-3 n.2. See Appellant's Br. at 9, 37-40, in *Heckler* v. *Owens*, No. 84-1905. This exception has no application here, however, because respondents have not challenged the constitutionality of any provision of the Social Security Act.

[5] See 5 Fed. Reg. 4169, 4171-4174 (1940), adopting 20 C.F.R. 403.706(c), 403.708(g), 403.709(*l*), 403.710(e) (1941). The original regulations were based on the January 1940 report of the Social Security Board regarding the manner in which 42 U.S.C. 405(g) would be implemented. See *Salfi*, 422 U.S. at 759-760 n.6; *id.* at 790-792 (Brennan, J., dissenting). That report made clear that

and it was in effect when Congress enacted the Title II disability program in 1954 and 1956 and the SSI program in 1972.[6] Congress's express directive that a disability claimant under those programs may obtain judicial review "as is provided in section 405(g)" (see 42 U.S.C. 421(d), 1383(c)(3)) therefore constituted a ratification of the requirement that an Appeals Council decision be obtained prior to judicial review and clear authorization for the Secretary to apply the same requirement under the disability and SSI programs. *Lindahl*, slip op. 12 & n.15; *Haig* v. *Agee*, 453 U.S. 280, 297-301 (1981).

3. Congress has thoroughly studied the claims adjudication process under the Social Security disability programs on numerous occasions in the decade since *Salfi* was decided, and it has revised the procedures at several stages of the administrative review process. See *Day*, slip op. 8-14. But in doing so, Congress repeatedly has stressed the importance of the ALJ hearing stage (*id.* at 8-9, 11, 13), and it has left intact the fundamental requirement under Section 405(g) and *Salfi* that the claimant obtain a decision from the ALJ and the Appeals Council before seeking judicial review. Compare *Merrill Lynch*, 456 U.S. at 381-382.

Significantly, when Congress determined on the basis of its thorough assessment that certain disability claim-

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the Appeals Council would be an essential step in the administrative review process; that only a decision by the Appeals Council would constitute the Board's "final verdict" on a claim; and that the Board construed the Act to provide that a decision would not be "final" for purposes of judicial review until completion of any proceedings the Board deemed necessary after it conducted the evidentiary hearing required by 42 U.S.C. 405(b). See S. Doc. 10, 77th Cong., 1st Sess. Pt. 3, at 38-39, 51-53 (1941).

[6] Social Security Amendments of 1954, ch. 1206, § 106, 68 Stat. 1079; Social Security Amendments of 1956, ch. 836, § 103, 70 Stat. 815; see 20 C.F.R. 403.706(c), 403.708(b), 403.708(g), 403.709(b), 403.709(*l*), 403.710.(b), 403.710(e) (1954 & 1956). Social Security Amendments of 1972, Pub. L. No. 92-603, Tit. III, 86 Stat. 1465 *et seq.*; see 20 C.F.R. 404.908, 404.911, 404.916, 404.918, 404.940, 404.946, 404.951 (1972).

ants might experience undue hardship as a result of the delay occasioned by the requirement that they exhaust their administrative remedies, it fashioned a specific solution to that problem. Thus, Congress provided for the payment of benefits pending the ALJ's decision to individuals who had been receiving and perhaps dependent upon their Social Security disability benefits, but who were subsequently found by the state agency no longer to be disabled. See page 5, *supra*. In other circumstances—such as cases involving *new applicants* for disability benefits—Congress has continued to regard a retroactive award of benefits at a subsequent stage of the administrative review process (or on judicial review after exhaustion of administrative remedies) as a fully adequate remedy for an erroneous initial denial of benefits. See *Eldridge*, 424 U.S. at 339, 340. In no event, however, has Congress (unlike the court of appeals in this case) dispensed with the exhaustion requirement altogether, and thereby permitted a claimant to circumvent or ignore the orderly administrative procedures that it and the Secretary have prescribed.

Nor has this Court dispensed with the jurisdictional prerequisite of an Appeals Council decision during the period that Congress has closely scrutinized the Social Security programs. To the contrary, the Court reiterated the exhaustion principles of *Salfi* just two Terms ago in *Ringer* (slip op. 13-16), and it specifically rejected the contention that full exhaustion of administrative remedies should not be required because the "'elderly, ill, and disabled citizens who [*sic*] Congress intended to benefit from Social Security Act programs actually have suffered financially as well as physically'" as a result of the denial of their claims at the preliminary steps in the administrative review process (slip op. 23, quoting Resp. Br. at 31). The Court explained (*Ringer*, slip op. 23-24):

> In the best of all worlds, immediate judicial access for all of these parties might be desirable. But Congress, in § 405(g) and § 405(h), struck a different

> balance, refusing declaratory relief and requiring that administrative remedies be exhausted before judicial review of the Secretary's decisions takes place. * * * If the balance is to be struck anew, the decision must come from Congress and not from this Court.

Only five months after *Ringer* was decided, Congress enacted the Social Security Disability Benefits Reform Act of 1984, which made comprehensive revisions in the disability programs. Pub. L. No. 98-460, 98 Stat. 1794 *et seq.* The Senate Report on that Act contains an extensive explanation of the jurisdictional principles under Section 405(g) in connection with its discussion of the medical improvement issue that ultimately was resolved by Section 2 of the 1984 Act (98 Stat. 1794). See S. Rep. 98-466, 98th Cong., 2d Sess. 13-17 (1984). This Report reflects a clear understanding that the exhaustion principles of *Salfi* and *Ringer* apply fully to the disability programs and require an Appeals Council decision as a prerequisite to judicial review. S. Rep. 98-466, *supra*, at 15.[7] But although this Court had made clear in *Ringer*

[7] The Senate Report states (S. Rep. 98-466, *supra*, at 15):

> Under Section 205(g) of the Social Security Act, a claimant may obtain judicial review only of the Secretary's "final decision" on a claim made after a hearing, and only if he seeks judicial review within 60 days of that final decision. Governing regulations in turn provide that the Secretary's "final decision" subject to judicial review is rendered only after the individual has pressed his claim for benefits through all levels of the existing administrative appeals process, including seeking review by the Appeals Council. The Supreme Court held in *Weinberger* v. *Salfi*, 422 U.S. 749, 764, 766 (1975), that full exhaustion of the administrative appeals process established by the Secretary's regulations is a jurisdictional prerequisite to seeking judicial review pursuant to Section 205(g) of the Social Security Act, and the Supreme Court recently reaffirmed that holding in *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), slip op. 2, 3, 16. Accordingly, the only claims raising the medical improvement issue that would be "properly pending" in court under existing law on the date of enactment would be the claims of individuals who exhausted their administrative remedies through the Appeals Council stage and then sought judicial review under Section 205(g) of the Social Security Act within 60 days.

that any modification of those principles "must come from Congress and not from this Court" (slip op. 23-24), Congress did not include in the 1984 Act any amendment of the "final decision" requirement in Section 405(g).[8]

B. The Court Of Appeals' Ruling Dispensing With Exhaustion Cannot Be Reconciled With The "Final Decision" Requirement In 42 U.S.C. 405(g)

The court of appeals in this case completely disregarded these firmly established limitations on the exercise of subject matter jurisdiction under 42 U.S.C. 405(g). It instead held that a court may grant a "judicial waiver" of the exhaustion requirement under a "more

[8] Moreover, Congress demonstrated in the 1984 Act that it knows how to grant relief to disability claimants even when they have not satisfied the exhaustion requirement. In Section 2(d) of the 1984 Act (98 Stat. 1797), Congress provided for the remand to the Secretary, for redetermination under the new statutory medical improvement standard, of the claims of any individuals who were included as members of a class that had been certified in a case involving medical improvement, whether or not each individual class member had personally satisfied the jurisdictional requirements of 42 U.S.C. 405(g). 130 Cong. Rec. S11454 (daily ed. Sept. 19, 1984) (remarks of Sen. Dole). See *Heckler* v. *Kuehner*, No. 83-1593 (Nov. 5, 1984); *Heckler* v. *Lopez*, No. 84-115 (Dec. 10, 1984).

Congress took a different approach in cases involving individuals who have mental impairments. In Section 5(a) of the 1984 Act (98 Stat. 1801 (App., *infra*, 3a-5a)), Congress directed the Secretary to develop new standards for the evaluation of mental impairments. It then provided in Section 5(c) (98 Stat. 1801) that any person who had sought benefits based on a mental impairment and who was found not to be disabled on or after March 1, 1981, could reapply to the Secretary and be reevaluated under these new standards. But Congress did *not* provide for the reopening of the *past* administrative decisions denying such claims, without regard to the jurisdictional limitations in 42 U.S.C. 405(g), as the court of appeals did in this case. See generally Pet. 29-30.

general approach" that permits a court to "balanc[e]" what it believes to be the "competing considerations" in order "to arrive at a just result under the circumstances" (Pet. App. 13a). The defects in this holding are legion.

1. All else aside, the court of appeals' ad hoc and standardless "balancing" approach to the question of subject matter jurisdiction under 42 U.S.C. 405(g) would be totally unworkable. The existence of jurisdiction must turn on the application of a "clear test" that can be readily ascertained by litigants and readily applied by courts. *Heckler* v. *Edwards*, No. 82-874 (Mar. 21, 1984), slip op. 6. See also *Richardson-Merrell, Inc.* v. *Koller*, No. 84-127 (June 17, 1985), slip op. 14-15. Nowhere is that attribute more essential than under the massive Social Security programs, in which millions of claims for benefits and thousands of actions for judicial review are filed annually. The rule that judicial review is available only after the Appeals Council has issued a decision (at least in the absence of an issue that satisfies the familiar three-part test for "collateral" matters (see pages 35-39, *infra*)) has furnished such a clear test since the inception of the Social Security program. By contrast, the court of appeals' novel and unprecedented balancing test would introduce broad uncertainty for claimants, SSA, the state agencies and the courts. It also would inevitably lead to a further proliferation of the widespread litigation over threshold questions of jurisdiction that has increasingly burdened the Social Security system and would invite the very sort of "overly casual or premature judicial intervention" in the administrative process that Congress intended to prevent when it enacted the "final decision" requirement. *Ringer*, slip op. 23.

2. The more fundamental flaw in the court of appeals' ad hoc balancing approach to the question of subject matter jurisdiction is that it is flatly inconsistent with the text of the Act, implementing regulations, and this Court's decisions in *Salfi* and *Ringer*. Respondents

brought this suit to challenge the decisions made by the state agency in reviewing the disability claims filed by the individual class members. Section 405(g) and implementing regulations explicitly provide, however, that such preliminary determinations by the state agency must be reviewed in the first instance by an ALJ in HHS, in the course of the "hearing" required by Section 405(b). See 42 U.S.C. 421(d), 1383b(a), 1383(c)(1); pages 21-22, *supra*. Judicial review is available under 42 U.S.C. 405(g) only "after" that "hearing" and only after the Appeals Council has rendered the "final decision" on behalf of the Secretary. That is what Section 405(g) expressly requires, yet the court of appeals did not even mention these statutory terms in its discussion of the exhaustion issue. See Pet. App. 12a-15a.

Not only is the court of appeals' overall balancing approach completely at odds with the explicit statutory finality requirement: each of the factors the court weighed is independently one that Congress has not left to the courts to consider:

a. The court of appeals relied on its own view that exhaustion of administrative remedies would be futile (Pet. App. 15a). The court's finding of futility was patently erroneous. See pages 32-33, *infra*. But however that may be, this Court explicitly held in *Salfi* that the "final decision" requirement is a jurisdictional prerequisite that "may *not* be dispensed with merely by a judicial conclusion of futility" (422 U.S. at 766 (emphasis added)). See also *Ringer*, slip op. 15-16.

b. The court of appeals also seemed to believe that it could dispense with the exhaustion requirement because of its own assessment that some unspecified number of the disability claimants in the class might experience hardship as a result of what the court referred to as the "ordeal of having to go through the administrative process" (Pet. App. 14a). The court of appeals arrogated to itself a judgment that is not a court's to make.

It is Congress that establishes the procedures to govern the administrative review of claims, determines the subject matter jurisdiction of the lower federal courts, and prescribes the conditions on the waiver of sovereign immunity.

Congress surely was aware when it enacted the disability and SSI programs that errors would occur at the preliminary stages of the multi-stage administrative review process and that some individual claimants affected by those errors might experience hardship while they sought administrative review and a retroactive award of benefits. But Congress chose not to provide for an "individualized jurisdictional inquiry" (*Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 473 (1978)) into the possible hardship that might be experienced by any particular disability claimant if judicial review were not available before the Appeals Council acted. Compare *id.* at 473-474, 476. Virtually any disability claimant (or indeed any other claimant) could make such allegations, and the court then would be required either to conduct a time-consuming factual inquiry into that question (compare *Richardson-Merrell*, slip op. 14-15) or routinely to dispense with exhaustion.

Presumably for these reasons, when Congress established a system for the administrative adjudication of Social Security claims in 1939 and later incorporated that system into the disability and SSI programs, it necessarily legislated with the generality of cases in mind and established uniform rules to govern *all* such cases. Cf. *Eldridge*, 424 U.S. at 344; *Richardson-Merrell*, slip op. 14-15. As this Court recently observed, in adopting the rules it did "Congress must have felt that cases of individual hardship resulting from delays in the administrative process had to be balanced against the potential for overly casual or premature judicial intervention in an administrative system that processes literally millions of claims every year." *Ringer*, slip op. 23. Furthermore, in response to concerns about the possible hardship that might be occasioned by the exhaustion requirement, Congress has provided for the payment of benefits to certain claimants pending the ALJ's decision. But in all other instances, Congress has determined that a retroactive award of benefits is the appropriate statutory remedy for the erroneous loss of statutory benefits during the administrative appeals process. The court of appeals had no authority to disagree with that legislative judgment by labeling a claimant's inability to receive statutory benefits during the appeals process (much less the pursuit of the appeals process itself) as "irreparable" injury that warrants dispensing with the "final decision" requirement (Pet. App. 14a). See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 244 (1980).

c. The court of appeals also weighed in the balance its perception that respondents were complaining of a "procedural irregularity" rather than "substantive standards of eligibility" and that an award of benefits by an ALJ or the Appeals Council would not have vindicated their interest in procedural regularity. The court believed that this case was distinguishable from *Ringer* in this respect. Pet. App. 14a-15a.

In fact, however, this case is indistinguishable from *Ringer*. There, as here, the plaintiffs challenged instructions that were communicated by HHS to the entity responsible for adjudicating claims at the preliminary stages of the administrative review process, but that did not bind the ALJs and Appeals Council. Slip op. 3-4. There, as here, the plaintiffs contended that the instructions created a conclusive presumption of ineligibiilty, thereby depriving claimants of an individualized assessment of their eligibility. *Id.* at 8, 10, 13, 15. And there, as here, the plaintiffs sought to characterize their suit as a challenge only to a "procedural" irregularity rather than an actual claim for benefits, and they argued that an award of benefits by the ALJ or the Appeals Council would not vindicate their interest in procedural regularity. *Id.* at 7, 9, 10-11. The Court nevertheless held that

full exhaustion of administrative remedies was required. *Id.* at 14-16; see also *id.* at 2 (Stevens, J., concurring and dissenting). *Ringer* thus squarely controls this case.

Furthermore, the Court in *Ringer* expressly rejected the notion that the jurisdictional rules governing Social Security cases are inapplicable "simply because a claim somehow can be construed as 'procedural' " (slip op. 11). Many issues that arise in the adjudication of disability claims—*e.g.*, a state agency's or ALJ's determination regarding the probative value of evidence, the allocation of the burden of proof, the use of a presumption or other evidentiary rule, etc.—can be characterized as "procedural" in nature. But that label does not detract from the fact that the state agency's or ALJ's disposition of such issues pertains to the decision on the *merits* of whether the individual is disabled. Such issues therefore are subject to review when the merits of the claim are subject to review—after the Appeals Council has ruled (assuming that the error has not been corrected or been rendered moot by that time). See *FTC* v. *Standard Oil Co.*, 449 U.S. at 244 n.11, 246.

3. The court of appeals' holding that the class members were not required to seek review by an ALJ and the Appeals Council also is directly contrary to the purposes underlying the jurisdictional prerequisite of a "final decision." The exhaustion requirement allows SSA "an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, * * * to compile a record which is adequate for judicial review" (422 U.S. at 765), and to ensure that "the claim is neither otherwise invalid nor cognizable under a different section of the Act" (*ibid.*). See also *Ringer*, slip op. 15-16 & n.12. These purposes plainly would have been served by requiring exhaustion in this case.

The Commissioner of Social Security already had applied his "experience and expertise" and taken decisive steps to correct the apparent error by SSA personnel and the state agency before this suit even was filed. See

pages 9-10, *supra*. The intervention by the district court more than a year later therefore was completely unnecessary. Moreover, the internal SSA memoranda reflecting the interpretation of the regulations that respondents challenged concededly were not binding upon the ALJs or the Appeals Council. See pages 4-5, *supra*. As a result, individual claimants who received an adverse decision from the state agency were not prevented from obtaining a full consideration of their RFC or a favorable decision on the merits from an ALJ or the Appeals Council. Compare *Ringer*, slip op. 15. In fact, because the initial determination and reconsideration of a claim are primarily the responsibility of the state agency, it is the ALJ and Appeals Council stages of the review process that afford the Secretary her principal opportunity to apply her "experience and expertise" in the actual adjudication of a particular claim and to correct any errors that might have been committed by the state agency.

The ALJ hearing also affords the Secretary her fullest opportunity "to compile a record which is adequate for judicial review" (*Salfi*, 422 U.S. at 765). The ALJ has an obligation to "look[] fully into the issues," and he may secure additional evidence or raise and resolve new legal issues. 20 C.F.R. 404.944, 404.946, 416.1444, 416.1446. See *Campbell*, 461 U.S. at 469 n.12; *id.* at 471 (Brennan, J., concurring); *id.* at 473 (Marshall, J., dissenting). As a result, the ALJ might determine that the claim for benefits should be either allowed or disallowed for reasons that were not identified or adequately explored at the state agency level. *Salfi*, 422 U.S. at 762, 765; *Eldridge*, 424 U.S. at 331-332; *Ringer*, slip op. 16 n.12. Centralized review by the Appeals Council in turn serves to ensure that the complex statutory and regulatory provisions are correctly and uniformly applied by the approximately 800 ALJs. For these reasons, the ALJs and Appeals Council perform critical oversight functions even where it might appear to the claimant or a court that there is no particular reason to pursue an administrative appeal.

Finally, even if the ALJ and Appeals Council do not rule in the claimant's favor, the issues may be narrowed or clarified as a result of their scrutiny, and the record they have compiled may substantially facilitate judicial review. As a result, if the court were to conclude that an error of law was committed in the administrative proceedings, it might be in a position to reverse the ALJ's or Appeals Council's decision and direct an award of benefits, rather than remand for further proceedings; and if a remand is required, the existence of a complete record from the initial proceedings may render it unnecessary to conduct another full-blown evidentiary hearing.

These various purposes served by exhaustion are not mere abstractions. The experience of the eight individual named plaintiffs, most of whom conscientiously pursued their administrative remedies, vividly illustrates the practical advantages that would have accrued if the unnamed class members had chosen to pursue their administrative remedies in the same manner. Two of the eight named plaintiffs were found by an ALJ to be disabled at step three of the sequential evaluation process because their impairments were sufficiently severe to meet the listings of serious impairments (J.A. 97-98 (Jane Doe II); J.A. 145-146 (Richard Roe IV)). That determination made it unnecessary for the ALJ to assess their RFC. See pages 7-8, *supra*. A third plaintiff who had failed to pursue his administrative remedies beyond the reconsideration stage on his first application also was found to be disabled after he filed a second application (J.A. 22-23 (Richard Roe III)). And the remaining five named individual plaintiffs all were denied benefits on a basis other than the application of a presumption that a claimant whose mental impairment does not meet the listings has a sufficient RFC to perform unskilled work.[9]

[9] Three of these plaintiffs were denied benefits at step two of the sequential evaluation process because their impairments were found by the ALJ to be "nonsevere" (J.A. 78-80 (Jane Doe I); J.A. 21 (Jane Doe III); J.A. 125-126 (Richard Roe II)). That determination at step two made it unnecessary for the ALJ to consider the

If this experience is typical, there is no reason to believe that an ALJ would have relied on the challenged presumption to deny the claims of *any* of the thousands of individual claimants who elected not to request an ALJ to review the state agency's denial of their claim and who therefore were improperly included as members of the class in this case."[10]

4. The court of appeals' decision dispensing with the exhaustion requirement is even more egregiously wrong when its actual impact on the claims of the unnamed class members is considered. The court of appeals analyzed the exhaustion issue in terms of a claimant's interest in avoiding the administrative process in order to *expedite* judicial review, stressing what it believed would be the irreparable injury that would result if they were required to undergo the "ordeal" of "travel[ling] through the administrative maze as a prerequisite of a judicial hearing" (Pet. App. 14a-15a). However, the image the court attempted to convey of claimants who were diligently pursuing their claims and simply transferred

claimant's RFC at steps four and five of the process. See pages 7-8, *supra*. Another plaintiff was denied benefits because he was found by the ALJ, after an individualized assessment, to have the RFC to do his own past work. There was no reliance on a "presumption" of ability to do unskilled work generally (J.A. 155-156 (Richard Roe V)). Compare *Orlando* v. *Heckler*, No. 84-2283 (7th Cir. Nov. 5, 1985), slip op. 11-14. The remaining named plaintiff was found by the ALJ to have an impairment that met the listings, but he was denied benefits because he was not in insured status at the time of the onset of his disability (J.A. 112-115 (Richard Roe I))—a reason that likewise is unrelated to the alleged presumption concerning RFC.

[10] Moreover, four of the five named individual plaintiffs whose claims for benefits were denied by an ALJ already had exhausted their administrative remedies through the Appeals Council stage and filed an individual action for judicial review under 42 U.S.C. 405(g) by the time the amended complaint was filed. J.A. 20 (Jane Doe I); J.A. 21 (Jane Doe III); J.A. 22 (Richard Roe II); J.A. 24 (Richard Roe V). Any objection these plaintiffs had to the manner in which their claims were decided could have been fully addressed in those individual suits.

their claims from an administrative to a judicial forum in order to obtain immediate relief bears no relation to the actions of the vast majority of the unnamed class members in this case who did not exhaust their administrative remedies.

Each of those class members had his own claim for benefits pending before the state agency (or an ALJ) at some time after April 1, 1980 (Pet. App. 36a), and each received a notice informing him that he had 60 days within which to seek further administrative review. Yet each of the class members involved declined to do so. None personally sought judicial review, thereby exhibiting no interest in an expedited determination of his claim. Nor is their any indication that any class member even knew of this lawsuit, much less that he stopped pursuing his administrative remedies on the belief that his claim had effectively been transferred to the district court by the filing of this class action. For all that appears, the thousands of unnamed class members involved simply abandoned their claims for benefits. Perhaps many accepted the correctness of the state agency's decision that they were not disabled within the meaning of the Social Security Act, or at least concluded that the question was sufficiently debatable so as not to be worth challenging; perhaps others had recovered from their impairments or found work notwithstanding them. But whatever the reasons, the failure by any unnamed class member to request further review within 60 days, after being personally notified of his right to do so, must be regarded as a deliberate acceptance of the consequence that the administrative decision denying his own claim for benefits would thereby become binding.

Jurisdictional problems to one side, there are no equitable considerations that could justify a court order requiring the Secretary to divert her scarce resources from the adjudication of the claims of other persons who *have* pursued their administrative remedies and to devote them instead to the reopening of thousands of cases that were knowingly abandoned by the individual claim-

ants involved. See *Baldwin County Welcome Center*, slip op. 5. In fact, those claimants have not even sought that relief, either from the Secretary or the court. It was the handful of named plaintiffs in this case who sought to require the Secretary to reopen these other claims.[11] For these reasons, when a court disregards the exhaustion requirement in a class action, the result is a sweeping disruption of the repose of previously settled claims and a wholly unwarranted judicial intrusion into the orderly administration of the Social Security programs.

C. This Case Does Not Fall Within The Narrow Exception Permitting Judicial Review Of Entirely Collateral Matters Prior To The Appeals Council's Decision

As we have demonstrated, the general rule is that a district court does not have jurisdiction under 42 U.S.C. 405(g) unless the Appeals Council has fully disposed of the individual's claim for benefits on the merits. That requirement obviously was not met on a class-wide basis here. This Court has recognized only one narrow exception to the exhaustion rule, which is essentially identical to the "collateral order" exception to the final judgment rule under 28 U.S.C. 1291. See *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*. However, that exception applies only to orders "affecting rights that will be irretrievably lost in the absence of an immediate appeal"

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[11] The City and State of New York have no right to judicial review—under 42 U.S.C. 405(g) or any other statute—of the Secretary's interlocutory or final decision denying a claim for benefits. Section 405(g) grants a right of *judicial* review only to an individual who was a party to the *administrative* review of the particular claim. This express grant of a right of judicial review to certain parties in itself indicates that Congress has foreclosed judicial review at the behest of other persons, such as the City and State. *Block* v. *Community Nutrition Institute*, No. 83-458 (June 4, 1984), slip op. 6. But in addition, the second sentence of 42 U.S.C. 405(h) bars review of any "decision" of the Secretary except as provided in Section 405(g), and there is no affirmative grant of a right of review to the City and State in the latter provision.

(*Richardson-Merrell*, slip op. 6), and it likewise has no application in this case.

The exception for "collateral" issues was first recognized by this Court in a Social Security case in *Mathews* v. *Eldridge*, *supra*. See 424 U.S. at 330-332. There, the claimant asserted a due process right under *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), to an evidentiary hearing before his disability benefits were terminated. The Court relied on several factors in holding that the district court had jurisdiction under 42 U.S.C. 405(g) to decide that legal issue, even though the claimant had not presented his constitutional argument to the Secretary or obtained an Appeals Council decision.

First, it was "unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context." 424 U.S. at 330. Second, the claimant's constitutional contention that his benefits could not be terminated without a prior hearing was "entirely collateral to his substantive claim of entitlement." *Ibid.* Third, the claimant's assertion of a constitutional right to a predeprivation hearing necessarily "rest[ed] on the proposition that full relief cannot be obtained at a post-deprivation hearing," and the claimant "ha[d] raised at least a colorable claim that because of his physical condiiton and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments" (*id.* at 331 (footnote omitted)). The Court accordingly determined that, unlike in *Salfi*, the grant or denial of Eldridge's substantive claim at a subsequent stage of the administrative process or on judicial review "would not answer his constitutional challenge" (*id.* at 331-332). The Court concluded, in other words, that the asserted constitutional right to a *predeprivation* hearing would be irretrievably lost and effectively irremediable if judicial review were available only after the Secretary's final decision on his claim for benefits, which would occur only after the payment of benefits had terminated.

The three factors just discussed precisely parallel the three conditions that an order of a district court must satisfy to fall within the "collateral order" exception to the final judgment rule under 28 U.S.C. 1291. Such an order "must 'conclusively determine the disputed question,' 'resolve an important issue completely separate from the merits of the action,' and 'be effectively unreviewable on appeal from a final judgment.'" *Richardson-Merrell*, slip op. 6 (quoting *Coopers & Lybrand*, 437 U.S. at 468). The Court's observation in *Eldridge* that there was no realistic possibility that the Secretary would revise the existing administrative review system at the behest of a single claimant was essentially the equivalent of a finding that the Secretary had "conclusively determine[d] the disputed question" of whether Eldridge would be afforded a pretermination hearing. The Court's holding that Eldridge's assertion of a constitutional right to such a hearing was "entirely collateral to his substantive claim of entitlement" was but another way of saying that it was "completely separate from the merits of the action." And the Court's conclusion (in light of the purposes of a deprivation hearing) that Eldridge had raised at least a colorable claim that "an erroneous termination would damage him in a way not recompensable through retroactive payments" was the equivalent of a determination that his constitutional contention would be "effectively unreviewable on appeal from a final judgment" by the Appeals Council. See *Johnson* v. *Heckler*, No. 85-1254 (7th Cir. Oct. 30, 1985), slip op. 3 (Easterbrook, J., dissenting from denial of rehearing en banc).

The congruence between the analysis in *Eldridge* and the collateral order doctrine of *Cohen* is no accident. The Court in *Eldridge* expressly relied upon *Cohen* in support of its jurisdictional holding. See 424 U.S. at 331 n.11. And in *Bell* v. *New Jersey*, *supra*, the Court reaffirmed the parallel between *Eldridge* and *Cohen*, observing that each creates an exception only for an "appeal-

able collateral order." 461 U.S. at 778-779.[12] Because 42 U.S.C. 405(g) and 28 U.S.C. 1291 speak in identical terms and confer jurisdiction to review only "final decisions," it is natural that the collateral order exception should have the same scope under both statutes.

It is well settled that an order must satisfy all three of the conditions just discussed to fall within the collateral order exception to the final judgment rule. *Richardson-Merrell*, slip op. 6; *Mitchell* v. *Forsyth*, No. 84-335 (June 19, 1985), slip op. 11. The issue in *Eldridge* concerning the right to a pretermination hearing did satisfy all three conditions. In this case, by contrast, respondents' challenge to the state agency's alleged use of a presumption of an ability to perform substantial gainful activity plainly satisfied none of those conditions.

First, the state agency did not "conclusively determine" whether any individual class member's claim would be disposed of by utilization of such a presumption and without an individualized assessment of his RFC, because the ALJ and Appeals Council concededly were not bound to follow that approach. Compare *Ringer*, slip op. 4, 15-16 & n.12. Second, respondents' challenge to the state agency's application of the regulations implementing the statutory definition of disability was not "entirely collateral" to (or "completely separate" from) any class member's claim for benefits. The court of appeals acknowledged as much, grudgingly conceding that respondents' contentions were "somewhat intertwined" with their demands for benefits (Pet. App. 14a). This defect alone was sufficient to defeat jurisdiction under the rationale of *Eldridge* and *Cohen*. See *Hyatt* v. *Heckler*, 757 F.2d 1455, 1460 (4th Cir. 1985), petition for cert. pending, No. 85-474.

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[12] The Court stated (461 U.S. at 778-779): "[W]e conclude that, at least in the absence of an appealable collateral order, *Mathews* v. *Eldridge*, 424 U.S. 319, 331 n.11 (1976); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547 (1949), the federal courts may exercise jurisdiction only over a final order of the Department."

Finally, respondents' contentions were not "effectively unreviewable on appeal from a final judgment." If the ALJ and Appeals Council were to employ the challenged presumption and fail to make a sufficiently individualized assessment of a class member's RFC, that defect (like any other error in the administrative determination of disability) would be fully reviewable in court after the Appeals Council had ruled. Unlike the asserted constitutional right to a predeprivation hearing involved in *Eldridge*, the statutory issue respondents have raised is not one that "will be irretrievably lost in the absence of an immediate appeal." *Richardson-Merrell*, slip op. 6; see *Eldridge*, 424 U.S. at 331-332 & n.11. See also *Ringer*, slip op. 14-15; *Johnson* v. *Heckler*, slip op. 3 (Easterbrook, J., dissenting). But see *Johnson* v. *Heckler*, 769 F.2d 1202, 1205-1206 (7th Cir. 1985); *Polaski* v. *Heckler*, 751 F.2d 943, 951-954 (8th Cir. 1984), petition for cert. pending, No. 85-55.

For the foregoing reasons, respondents cannot rely on the collateral order rationale of *Eldridge* and *Cohen* to avoid the consequences of the unnamed class members' abandonment of their claims before they obtained a final decision by the Appeals Council. A contrary holding would "'transform the limited exception carved out in [*Eldridge*] into a license for broad disregard of the finality rule imposed by Congress in [42 U.S.C. 405 (g)].'" *Richardson-Merrell*, slip op. 16 (quoting *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. at 378 (brackets added)).

II. A CLAIMANT MUST SEEK JUDICIAL REVIEW UNDER 42 U.S.C. 405(g) WITHIN 60 DAYS OF THE SECRETARY'S FINAL DECISION UNLESS THE SECRETARY HAS EXTENDED THAT FILING PERIOD

The district court, affirmed by the court of appeals, included in the class all covered individuals who received an adverse determination by the New York state agency on or after April 1, 1980, almost three years before this suit was filed in February 1983 (Pet. App. 65a). This

aspect of the class certification is directly contrary to the requirement in 42 U.S.C. 405(g) that a claimant must seek judicial review of the Secretary's final decision "within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow."

The Secretary has promulgated regulations establishing a procedure for the exercise of her authority under 42 U.S.C. 405(g) to extend the filing period in appropriate circumstances. Under those regulations, the claimant must file a written request with SSA explaining why he did not seek judicial review within 60 days. SSA then will extend the filing time if it determines that the claimant has established "good cause" for missing the deadline. 20 C.F.R. 404.982, 404.911, 416.1482, 416.1411.[13] The regulations describe as examples of "good cause" the failure to receive notice of the administrative decision and the conveyance by SSA of incorrect or incomplete information about "when and how * * * to file a civil suit." 20 C.F.R. 404.911(b), 416.1411(b). There is no indication that any of the class members who received a final decision of the Secretary more than 60 days before this suit was filed ever submitted an extension request to the Secretary. The claims of those individuals therefore remain time-barred, and they were not properly included in the class.

A. The District Court Had No Authority To Extend The 60-day Filing Period In 42 U.S.C. 405(g)

Despite the failure of the time-barred class members to invoke the procedure established by Congress and the Secretary to extend the filing period under 42 U.S.C.

[13] The regulations also provide for the Secretary to extend the period for seeking further review at the earlier stages of the administrative appeals process. 20 C.F.R. 404.909, 404.911, 404.933(c), 404.968(b), 416.1409(b), 416.1411, 416.1433(c), 416.1408(b). A decision by the Secretary denying a request to extend any of the filing periods is not subject to the administrative appeal process or to judicial review. 20 C.F.R. 404.903(j), 416.1403(a)(8). Cf. *Califano* v. *Sanders*, 430 U.S. 99, 108 (1977).

405(g), the court of appeals sustained the exercise of jurisdiction over their claims. The court of appeals believed that a court has independent authority to extend the 60-day filing period, and in this case it deemed the running of that period to have been "effectively tolled" on a state-wide basis during the time that the challenged presumption concerning RFC was "operative but undisclosed" (Pet. App. 17a-18a). This holding is plainly wrong.

1. *The Condition That A Suit Be Filed Within 60 Days Is An Explicit Limitation On The District Court's Jurisdiction Under 42 U.S.C. 405(g)*

The district court exceeded its jurisdiction by granting relief to individuals whose claims were finally denied by the Secretary more than 60 days before this class action was filed. "'[T]he United States, as sovereign, "is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit."'" *Lehman* v. *Nakshian*, 453 U.S. at 160 (quoting *United States* v. *Testan*, 424 U.S. 392, 399 (1976), and *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)). Consistent with these principles, the Court held in *Salfi* that the "final decision" requirement in 42 U.S.C. 405(g) is "central to the requisite grant of subject-matter jurisdiction" (422 U.S. at 764) and a "statutorily specified jurisdictional prerequisite" to suit that may not be dispensed with by a court (*id.* at 766). See also *Ringer*, slip op. 14.

The requirement in 42 U.S.C. 405(g) that an action for judicial review be commenced within 60 days of "such decision" appears in the same sentence as the "final decision" requirement. The most natural reading of Section 405(g) therefore is that the 60-day requirement likewise is a "statutorily specified jurisdictional prerequisite" to suit that may not be dispensed with by a court. *Hunt* v. *Schweiker*, 685 F.2d 121, 123 (4th Cir. 1982). See also *Hyatt* v. *Heckler*, 757 F.2d 1455, 1460-1461 (4th Cir. 1985), petition for cert. pending, No.

85-474; *Biron* v. *Harris*, 668 F.2d 259, 261 (6th Cir. 1982). But see *Minnesota Mental Health*, 720 F.2d at 973 n.19; *Hatchell* v. *Heckler*, 708 F.2d 578, 580 n.1 (11th Cir. 1983). A court therefore has no jurisdiction to entertain an action brought by (or on behalf of) any individual who has not complied with the 60-day filing requirement. *Heckler* v. *Lopez*, 464 U.S. 879, 881 (1983) (Stevens, J., dissenting in part). As Justice Stevens explained (*ibid.*):

> These persons' right to seek administrative or judicial review of their * * * decisions had expired, and they could obtain benefits only by requesting that the Secretary reopen their cases. However, the District Court had no jurisdiction to review the Secretary's refusal to reopen these cases. *Califano* v. *Sanders*, 430 U.S. 99 (1977). Hence, the District Court had no jurisdiction over these persons and should not have granted them relief * * *.

This view of the 60-day filing requirement in 42 U.S.C. 405(g) is consistent with the interpretation of other statutes that waive the government's sovereign immunity but limit the time within which a suit may be brought. The seminal case is *Finn* v. *United States*, 123 U.S. 227, 232-233 (1887), in which the Court held that the failure by the attorney for the government to plead as a defense the six-year limitation on the bringing of an action against the United States in the Court of Claims could not effect a waiver of that limitation. The Court noted that the government had not conferred authority on its officers to waive that limitation. 123 U.S. at 233. Accordingly, it held that "[s]ince the Government is not liable to be sued, as of right, by any claimant, and since it has assented to a judgment being rendered against it only in certain classes of cases, brought within a prescribed period" (*ibid.*), it was the duty of the court to dismiss the action if it was untimely (*id.* at 232). See also *United States* v. *Wardwell*, 172 U.S. 48, 52 (1898) (the provision "is not merely a statute of limitations but also jurisdictional in its

nature, and limiting the cases of which the Court of Claims can take cognizance"). In 1938, the Court applied the same rule to a suit brought in district court under the Tucker Act (Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 *et seq.*), where the attorney for the government again had failed to plead the six-year bar. *Munro* v. *United States*, 303 U.S. 36, 41 (1938).

It was against this background that Congress in 1939 enacted Section 405(g) and thereby waived the government's immunity to suits arising under the Social Security Act. Because *Munro* had been decided only a year earlier and because Section 405(g) authorizes a suit against the government to recover money from the Treasury, it is reasonable to assume that Congress likewise intended the 60-day filing requirement in Section 405(g) to state a jurisdictional limitation.

The conclusion that Section 405(g) should be so construed is reinforced by the fact that, as respondents concede (Br. in Opp. 22), other statutory limitations on bringing suit against the government uniformly have been understood to be conditions on the waiver of sovereign immunity and therefore jurisdictional prerequisites to suit. Under *Finn* and *Munro*, the six-year limitation in 28 U.S.C. 2501 on the bringing of suits in the Court of Claims (now the Claims Court) and the parallel limitation in 28 U.S.C. 2401(a), which is applicable to "every civil action" brought against the United States in district court, of course are jurisdictional in nature. See also *Soriano* v. *United States*, 352 U.S. 270, 275-276 (1957). The two-year limitation in 28 U.S.C. 2401(b) for suits under the Federal Tort Claims Act (FTCA) and the 12-year limitation in 28 U.S.C. 2409a(f) for suits under the Quiet Title Act also have been recognized as conditions on the waiver of sovereign immunity. See *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983).

Especially in light of this broad acceptance of the settled principle that such limitations are conditions on the waiver of sovereign immunity and are therefore jur-

isdictional in nature, "[t]he appropriate inquiry * * * is whether Congress clearly and unequivocally departed from its usual practice in this area" (*Lehman* v. *Nakshian*, 453 U.S. at 162) with respect to Social Security cases brought under 42 U.S.C. 405(g). See *Soriano*, 352 U.S. at 275-276. Nothing in the text of the 1939 amendments to the Social Security Act or their sparse legislative history suggests that it did. To the contrary, the second sentence of Section 405(h) expressly states that "[n]o findings of fact or decision of the Secretary shall be reviewed by any * * * tribunal * * * except as herein provided"—by which Congress meant "except as provided in subsection (g) [of Section 405]" (S. Rep. 734, 76th Cong., 1st Sess. 52 (1939); H.R. Rep. 728, 76th Cong., 1st Sess. 43-44 (1939)). This preclusion of review underscores the fundamental importance Congress attached to the conditions on the grant of subject matter jurisdiction in Section 405(g). Similarly, the Senate Report on the 1984 Disability Act, in its discussion of the 60-day filing requirement, cited with approval the Fourth Circuit's holding in *Hunt* v. *Schweiker*, *supra*, that this provision is jurisdictional in nature and is not subject to tolling. S. Rep. 98-466, *supra*, at 17.

We recognize that in *Salfi* and *Eldridge*, the Court described the 60-day filing requirement as a "statute of limitations" that was waived by the Secretary because it had not been raised in district court. 422 U.S. at 763-764; 424 U.S. at 328 n.9. However, the nature of the 60-day filing period was not addressed by the parties in either case, and the Court's statements were dicta because in each instance the claimant had sought judicial review within 60 days of the relevant administrative action. App. at 1, 9, 17-20, *Weinberger* v. *Salfi*, No. 74-214 (1974 Term); App. at 1-3, 14, *Mathews* v. *Eldridge*, No. 74-204 (1974 Term). The Court also did not refer in either opinion to its prior holdings in *Finn* and *Munro* that such a prerequisite to suit is jurisdictional and is not subject to whatever rules of waiver

might apply to an ordinary statute-of-limitations defense available to a private party.

In any event, the dicta in *Salfi* and *Eldridge* do not support the decision in this case. The court of appeals did not sustain the district court's exercise of jurisdiction over the claims of the class members who did not comply with the 60-day filing requirement on the ground that the Secretary had failed to object in a timely fashion.[14] The court of appeals instead held that the district court could grant relief even in the absence of any action by the Secretary extending or waiving the 60-day filing period. However, in the absence of any such action by the Secretary that could be held to have "allow[ed]" additional time under the dicta in *Salfi* and *Eldridge*, those class members who received "final decisions" denying their claims for benefits more than 60 days before this suit was filed violated an explicit condition on the waiver of sovereign immunity in 42 U.S.C. 405(g).

2. *The Court Of Appeals Had No Authority To Extend The 60-day Filing Period Even If It Is Not Strictly Jurisdictional In Nature*

The court of appeals' holding was clearly wrong even if, contrary to our submission above, the 60-day filing requirement is not regarded as jurisdictional in the strictest sense. Statutorily mandated limits on the time within which a suit may be brought against the government, however they may be characterized, must be

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[14] The district court did hold that the Secretary had waived the 60-day issue under Fed. R. Civ. P. 8(c) as regards the entire class because she did not specifically mention it in her answer to the complaint (Pet. App. 59a), but the court of appeals did not reach that question (*id.* at 17a). The district court did not advert to the fact that the Secretary did assert in her answer that the district court lacked subject matter jurisdiction (J.A. 57), which was sufficient to include a failure to comply with the requirements of Section 405(g). Moreover, the Secretary specifically raised the 60-day issue not only in her post-trial brief, as the district court observed (Pet. App. 59a), but also at the outset of the trial, relying on the then-recent stay proceedings in *Heckler* v. *Lopez*, *supra* (J.A. 161-163).

strictly construed and enforced, and the courts are not authorized to fashion their own tolling rules or to extend those time limits beyond what Congress has permitted. *Soriano* v. *United States*, 352 U.S. 270, 275-276 (1957); *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979). Cf. *United States* v. *Boyle*, No. 83-1266 (Jan. 9, 1985), slip op. 7-8. The fact that Congress expressly vested authority in the *Secretary* to extend the 60-day filing period under 42 U.S.C. 405(g), but conferred no such authority on the courts, strongly reinforces the conclusion that a court has no independent authority to excuse noncompliance with the 60-day requirement under duplicative, judicially fashioned tolling rules. Compare *Salfi*, 422 U.S. at 766-767. Cf. *United States* v. *Locke*, No. 83-1394 (Apr. 1, 1985), slip op. 9 n.10.

The way in which the court of appeals sought to avoid application of the 60-day rule in this case is particularly objectionable, even assuming that a court could excuse a particular claimant's default in certain special circumstances. The court of appeals held that the running of the 60-day period was "effectively tolled" throughout New York State, from April 1, 1980 until this suit was filed on February 8, 1983, because during that time the challenged presumption concerning RFC was "undisclosed" (Pet. App. 18a). This holding constitutes an intolerable and wholly unwarranted judicial interference with the orderly procedure for the administrative review of Social Security claims. It apparently would have the effect of retroactively tolling the running of the 60-day period for all claimants in a particular state (or even throughout the Nation) who received an adverse administrative decision based on an interpretation of the Act or regulations that was contained in internal operating instructions whenever that interpretation later turns out to have been erroneous. Such implementing instructions, which are not required to be published in the *Federal Register*, are commonplace in the administration of the Social Security Act. The haphazard and sweeping principle of "tolling" announced by the court

of appeals therefore "would frustrate the congressional purpose, plainly evidenced in [Section 405(g)], * * * to forestall repetitive or belated litigation of stale eligibility claims." *Califano* v. *Sanders*, 430 U.S. at 108. The court of appeals disregarded its "duty * * * to respect that choice" by Congress. *Ibid.*

The court of appeals conceded that the class members "knew of the denial or loss of benefits" (Pet. App. 18a). This of course is clear from the fact that, under applicable procedures, an individual is personally notified when his claim is denied at any stage of the administrative review process that he must seek further review within 60 days; and when a claim is denied by the Appeals Council, the claimant is specifically notified that he must seek judicial review within 60 days. See, *e.g.*, J.A. 83-84, 127, 157. Compare *Atkins* v. *Parker*, No. 83-1660 (June 4, 1985), slip op. 12, 15. By the express terms of 42 U.S.C. 405(g), the mailing of the latter notice to the claimant triggers the running of the 60-day period within which to file suit. The court of appeals was not free to refashion the statutory scheme by designating different operative dates.

The court of appeals relied on a parallel it drew to when a cause of action "accrues" under the two-year limitations provision in the FTCA (28 U.S.C. 2401(b)). See Pet. App. 18a, citing *Barrett* v. *United States*, 689 F.2d 324, 327-330 (2d Cir. 1982) (a FTCA case). But contrary to the court of appeals' belief, FTCA principles would not support its unprecedented tolling rule even if they applied to this case. This Court held in *United States* v. *Kubrick*, *supra*, that a claim "accrues" under the FTCA when the plaintiff has discovered both his injury and its probable cause. In this case, when each class member received the notice of an administrative decision denying his claim, he clearly knew of his "injury" (the denial of statutory benefits), its "cause" (the adverse decision), and who caused it (the Secretary, acting through SSA or the state agency). Under FTCA principles, the 60-day period would clearly begin to run at that point, even if the claimant did not also know that

the state agency had relied on an erroneous interpretation of the regulations. *Kubrick*, 444 U.S. at 121-122. There is no need to dwell further on the analogy to *Kubrick*, however, because this case neither arose under the FTCA nor required the court below to ascertain when the statutory cause of action created by 42 U.S.C. 405(g) first "accrues." Congress *specified* when that cause of action accrues: when notice of the "final decision" of the Secretary is mailed to the claimant. That specification is controlling.

The court of appeals also seemed to believe that its tolling rule could be supported in this case by labeling the alleged presumption regarding RFC as "secretive" (Pet. App. 18a). The apparent premise of this holding—that there was some sort of sinister practice or active concealment by SSA—is mistaken. There is no indication that the memoranda upon which the district court relied (*id.* at 41a) were anything other than ordinary communications in the normal course of agency business concerning an issue on which the personnel involved were attempting in good faith to develop and articulate a policy. Nothing about them indicates they were intended to be "secretive." To the contrary, an agency of the State of New York—one of the plaintiffs in this case—was responsible for making the RFC determination, and it concededly had full knowledge of the interpretation reflected in those memoranda. However erroneous that interpretation may appear in hindsight, the documents purported to interpret and apply the governing regulations and implementing forms and instructions in the particular context of certain mental impairments, not to establish a secret regime in deliberate contravention of those materials. Similarly, SSA quality reviews of state agency decisions, upon which the district court also relied (*id.* at 34a-36a, 39a-40a), are a regular part of SSA's oversight responsibility that are mandated by Congress (see 42 U.S.C. 421(c)) and are fully disclosed to the state agency.

In any event, even if certain SSA personnel had deliberately conveyed to the state agency an interpretation

of the regulations they knew to be incorrect, that factor clearly would not permit a court to toll the running of the 60-day period. The notice of the state agency's decision still would have informed the claimant that he had been found able to work (and therefore not to be disabled within the meaning of the Act) and of his right to seek further administrative review. See, *e.g.*, J.A. 60, 86-87, 91, 101-102, 104, 107. There is no reason to believe that any error made in reaching that conclusion—even a deliberate error—would have posed an obstacle to the claimant's ability to seek further administrative review within 60 days if he disagreed with the state agency's express finding that he could work, or to file suit under 42 U.S.C. 405(g) to challenge that administrative determination if he had received an Appeals Council decision. Cf. *INS* v. *Hibi*, 414 U.S. 5 (1973). But if an obstacle to seeking further review somehow did result, the claimant presumably could establish "good cause" for the Secretary to extend the 60-day period or to reopen the adverse determination under the existing administrative procedures. See pages 6, 40 and note 13, *supra*. The court of appeals had no authority to supplant those procedures for granting relief in individual cases of proven merit and to dispense with the 60-day filing period on a class-wide basis.

B. The 60-day Filing Requirement Cannot Be Avoided By Resort To Mandamus Jurisdiction Under 28 U.S.C. 1361

The court of appeals further held that even if the district court did not have jurisdiction under 42 U.S.C. 405(g) to review those individual "final decisions" that were rendered more than 60 days before this suit was filed, it had authority under the mandamus statute, 28 U.S.C. 1361, to review and order the reopening of those decisions (Pet. App. 19a-20a). This holding, too, was plainly wrong. The second sentence of 42 U.S.C. 405(h) provides that "[n]o findings of fact or decision of the Secretary shall be reviewed by any * * * tribunal * * * except as herein provided"—*i.e.*, except as provided in

42 U.S.C. 405(g), subject to that Section's 60-day time limit. See page 44, *supra*. Section 405(h) thus expressly forecloses the very circumvention of the 60-day rule that the court of appeals countenanced in relying on the mandamus statute.

This Court, however, previously has declined to decide whether Section 405(h) entirely bars mandamus jurisdiction with respect to matters affecting the Social Security program. See, *e.g.*, *Ringer*, slip op. 12. There likewise is no need to resolve that question here, because the exercise of mandamus jurisdiction in this case is in any event contrary to established law.

The court of appeals conceded (Pet. App. 20a-21a n.7) that under this Court's decision in *Ringer*, slip op. 12-13, the exhaustion requirement embodied in the "final decision" language of 42 U.S.C. 405(g) cannot be circumvented by resort to mandamus jurisdiction. It necessarily follows that the 60-day filing requirement embodied in the same sentence of Section 405(g) also cannot be avoided in this manner. Moreover, mandamus is not available where there is another adequate remedy or where the defendant does not owe the plaintiff a clear nondiscretionary duty. *Ringer*, slip op. 13. Here, the class members involved had a fully adequate remedy under 42 U.S.C. 405(g); they simply failed to invoke it in a timely fashion. *Ringer*, slip op. 13. Furthermore, the Secretary's determination whether a particular individual has the RFC to do unskilled work is itself a discretionary decision (*ibid.*), and, in addition, the Secretary has no mandatory duty to reopen the binding administrative decisions of time-barred class members in order to reevaluate each member's RFC. See *Califano* v. *Sanders*, *supra*.[15]

[15] As originally enacted in 1939, the third sentence of Section 205(h) of the Social Security Act (42 U.S.C. 405(h)) provided that no action to recover on any claim arising under Title II of the Social Security Act could be brought "under section 24 of the Judicial Code" (53 Stat. 1371), which at that time contained all of the general grants of jurisdiction to the district courts. See *Salfi*, 422 U.S. at 756 n.3. When the mandamus statute was enacted in 1962, Congress placed it in Chapter 85 of Title 28 (see Act of Oct. 5, 1962, Pub. L. No. 87-748, 76 Stat. 744 *et seq.*), which likewise contains all of the general grants of jurisdiction to the district courts and therefore is the successor to the prior Section 41. The 1962 amendment thereby placed the mandamus statute within the scope of the jurisdictional bar in the third sentence of 42 U.S.C. 405(h).

In the 1976 version of the United States Code, the codifiers revised the third sentence of 42 U.S.C. 405(h) to refer to "section 1331 or 1346 of title 28," instead of "section 41 of title 28." This change was intended to reflect the 1948 revision of Title 28 (see 42 U.S.C. (1976 ed.) 405 note, at 518) and had no legal effect. *North Dakota* v. *United States*, 460 U.S. 300, 311 n.13 (1983). In Section 2663(a)(4)(D) of the Deficit Reduction Act of 1984 (Pub. L. No. 98-369, Stat. 1162), Congress amended Section 205(h) of the Social Security Act to refer to "section 1331 or 1346 of title 28." However, that amendment was characterized as one of a number of "technical corrections." H.R. Conf. Rep. 98-861, 98th Cong., 2d Sess. 1413-1415 (1984). It does not suggest a congressional intent to allow review of the Secretary's decisions by way of mandamus, which theretofore was foreclosed by the third sentence of Section 405(h) and remains barred by its second sentence.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides:

> Judicial review
>
> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a de-

cision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

2. Section 5 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1801, provides:

MORATORIUM ON MENTAL IMPAIRMENT REVIEWS

(a) The Secretary of Health and Human Services (hereafter in this section referred to as the "Secretary") shall revise the criteria embodied under the category "Mental Disorders" in the "Listing of Impairments" in effect on the date of the enactment of this Act under appendix 1 to subpart P of part 404 of title 20 of the Code of Federal Regulations. The revised criteria and listings, alone and in combination with assessments of the residual functional capacity of the individuals involved, shall be designed to realistically evaluate the ability of a mentally impaired individual to engage in substantial gainful activity in a competitive workplace environment. Regulations establishing such revised criteria and listings shall be published no later than 120 days after the date of the enactment of this Act.

(b)(1) Until such time as revised criteria have been established by regulation in accordance with subsection (a), no continuing eligibility review shall be carried out under section 221(i) of the Social Security Act, or under the corresponding requirements established for disability determinations and reviews under title XVI of such Act, with respect to any individual previously determined to be under a disability by reason of a mental impairment if—

(A) no initial decision on such review has been rendered with respect to such in-

dividual prior to the date of the enactment of this Act, or

(B) an initial decision on such review was rendered with respect to such individual prior to the date of the enactment of this Act but a timely appeal from such decision was filed or was pending on or after June 7, 1983.

For purposes of this paragraph and subsection (c)(1) the term "continuing eligibility review," when used to refer to a review of a previous determination of disability, includes any reconsideration of or hearing on the initial decision rendered in such review as well as such initial decision itself, and any review by the Appeals Council of the hearing decision.

(2) Paragraph (1) shall not apply in any case where the Secretary determines that fraud was involved in the prior determination, or where an individual (other than an individual eligible to receive benefits under section 1619 of the Social Security Act) is determined by the Secretary to be engaged in substantial gainful activity (or gainful activity, in the case of a widow, surviving divorced wife, widower, or surviving divorced husband for purposes of section 202(e) and (f) of such Act).

(c)(1) Any initial determination that an individual is not under a disability by reason of a mental impairment and any determination that an individual is not under a disability by reason of a mental impairment in a reconsideration of or hearing on an initial disability determination, made or held under title II or XVI of the Social

Security Act after the date of the enactment of this Act and prior to the date on which revised criteria are established by regulation in accordance with subsection (a), and any determination that an individual is not under a disability by reason of a mental impairment made under or in accordance with title II or XVI of such Act in a reconsideration of, hearing on, review by the Appeals Council of, or judicial review of a decision rendered in any continuing eligibility review to which subsection (b)(1) applies, shall be redetermined by the Secretary as soon as feasible after the date on which such criteria are so established, applying such revised criteria.

(2) In the case of a redetermination under paragraph (1) of a prior action which found that an individual was not under a disability, if such individual is found on redetermination to be under a disability, such redetermination shall be applied as though it had been made at the time of such prior action.

(3) Any individual with a mental impairment who was found to be not disabled pursuant to an initial disability determination or a continuing eligibility review between March 1, 1981, and the date of the enactment of this Act, and who reapplies for benefits under title II or XVI of the Social Security Act, may be determined to be under a disability during the period considered in the most recent prior determination. Any reapplication under this paragraph must be filed within one year after the date of the enactment of this Act, and benefits payable as a result of the preceding sentence shall be paid only on the basis of the reapplication.

3. 20 C.F.R. 404.1520 provides:

EVALUATION OF DISABILITY

Evaluation of disability in general.

(a) *Steps in evaluating disability.* We consider all material facts to determine whether you are disabled. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider your physical or mental impairment(s). Your impairment must be severe and meet the duration requirements before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review further.

(b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.

(c) *You must have a severe impairment.* If you do not have any impairment(s) which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not now have a severe impairment.

(d) *When your impairment meets or equals a listed impairment in Appendix 1.* If you have an impairment which meets the duration requirement and is listed in Appendix 1, or we determine that the impairment is equal to one of the listed impairments, we will find you disabled without considering your age, education, and work experience.

(e) *Your impairment must prevent you from doing past relevant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment, we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment must prevent you from doing any other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment, we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled.

(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule (see § 404.1562).

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RESPONDENT'S

BRIEF

No. 84-1923

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,
Petitioners,

—v.—

CITY OF NEW YORK, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

In this class action, the district court found that petitioners consistently applied a fixed, clandestine, illegal policy in adjudicating the claims for disability benefits of severely mentally ill individuals. Petitioners have not appealed from any of the district court's findings of fact.

The questions presented are:

1. Whether the court of appeals correctly ruled that the final decision requirement of 42 U.S.C § 405(g) had been satisfied, without requiring full exhaustion, on finding that petitioners had no legitimate interest in requiring further exhaustion, that the procedural issue raised by respondents could not be resolved in the administrative process, and that plaintiffs were irreparably harmed by the policy.

2. Whether the court of appeals correctly ruled that the 60 day limitation of § 405(g) does not bar review on finding that petitioners concealed the existence of the policy, misled claimants, and did not give claimants adequate notice of the reasons for the denial of benefits.

3. Whether, in the event that § 405(g) is construed not to provide a jurisdictional basis over the claims, the court of appeals correctly ruled that the mandamus statute, 28 U.S.C § 1361, provides an alternate basis.

4. Whether class members will be deprived of their right of access to the judicial forum in violation of the Constitution if § 405(g) is construed in the circumstances of this case not to provide a jurisdictional basis over their claims.

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* Pursuant to Rule 34.2, respondents refer to the Government's brief for the citations to Opinions Below and Jurisdiction.

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Dilda v. Quern, 612 F.2d 1055 (7th Cir. 1980), *cert. denied*, 447 U.S. 935 (1980) 44

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United States Title Insurance & Trust Co., 265 U.S. 472 (1924) 33

Vargas v. Trainor, 508 F.2d 485 (7th Cir. 1974), *cert. denied*, 420 U.S. 1008 (1975) 44

Vishnevsky v. United States, 581 F.2d 1249 (7th Cir. 1978)..... 46

Weinberger v. Salfi, 422 U.S. 749 (1975)..... *passim*

White v. Mathews, 434 F. Supp. 1252 (D. Conn. 1976), *aff'd*, 559 F.2d 852 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978) 45, 46

White v. Roughton, 530 F.2d 750 (7th Cir. 1976) 23

Williams v. Hidalgo, 663 F.2d 183 (D.C. Cir. 1980) 43

Winston v. Lee, 105 S. Ct. 1611 (1985) 26

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Wright v. Califano, 603 F.2d 666 (7th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980) 38

Statutes, Regulations, and Rules:

Administrative Procedure Act,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1923

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,

Petitioners,

—v.—

CITY OF NEW YORK, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to the materials appended by petitioners, § 205(b)(1) of the Social Security Act, 42 U.S.C. § 405(b)(1), reproduced in the Appendix hereto ("App.") at 1a-2a, provides, *inter alia*, that any disability denial decision:

> shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based.

Enacted in 1980, this provision came into effect in 1981. The Secretary's regulations previously had required that the notice

of an adverse decision contain a statement of reasons. 20 C.F.R. §§ 404.904, 404.921, 404.953(a), 416.1404, 416.1421, 416.1453(a) (1985). App. at 2a-4a.

COUNTERSTATEMENT

The respondent class, consisting of individuals with severe mental disabilities, prevailed in the district court on its challenge to petitioners' clandestine policy of preventing adjudicators of disability benefit claims under Titles II and XVI of the Social Security Act ("Act") from evaluating an applicant's actual ability to work. As relief, the class members' claims were remanded to the Social Security Administration ("SSA"), which was ordered to re-evaluate them using the correct procedures.

In the court of appeals, petitioners did not contest the district court's finding that the "fixed clandestine policy" existed and caused harm. They did not dispute the district court's conclusion that the policy violated the Act and its implementing regulations. Petitioners contended only, as they argue here, that the courts cannot grant relief to class members who did not exhaust their administrative remedies or file a complaint in the district court within 60 days of a final administrative decision.

Petitioners purport to vindicate an administrative system which they had significantly and pervasively undermined. They dispensed with the explicit requirements of the governing regulations that a claimant's capacity to work be independently assessed. They systematically pressured physicians to reach conclusions contrary to their professional judgments.[1] They refused to alter these practices when urged to do so. And they concealed these practices from all concerned—Congress, courts, administrative law judges ("ALJs") and, most significantly, claimants themselves.

1 Petitioners did so despite having twice persuaded this Court to conclude that decisions terminating benefits are entitled to presumptive weight because they generally turn on "routine, standard and unbiased reports by physician specialists." *Richardson* v. *Perales*, 402 U.S. 389, 404 (1971); see *Mathews* v. *Eldridge*, 424 U.S. 319, 344 (1976).

1. Petitioners' Statement Ignores or Mischaracterizes the District Court's Findings. Petitioners' contention that the exhaustion and time limitation provisions of § 205(g) of the Act, 42 U.S.C. § 405(g) ("§ 405(g)"), bar relief is predicated on ignoring or mischaracterizing the district court's findings.[2] First, petitioners mischaracterize respondents' claim in the lawsuit as one for benefits. Br. at 19, 26-27.[3] The lower courts, however, properly understood that respondents were not seeking an award of benefits, but had challenged SSA's secret violation of the procedure for determining claims.

Second, petitioners misdescribe the illegal practice as an "interpretation by certain Social Security Administration (SSA) personnel of several regulations . . . ." Br. at 2. *See also id.* at 9, 48. The courts below, however, found that SSA enforced a "fixed" and illegal policy, which was willfully adopted and consistently followed from 1978 until 1983. Pet. at 39a.

Third, in suggesting that the administrative review process would have afforded SSA the opportunity to examine its fixed policy in light of its experience and expertise, petitioners ignore the finding below that SSA had repeatedly been given that opportunity and had rejected it over the internal protests of its own claims adjudicators and reviewing physicians. *Id.* at 39a-41a, 60a.

2 Petitioners did not appeal those findings, nor do they challenge the court of appeals' reiteration of those findings. To the extent that petitioners' mischaracterizations are viewed as contesting those findings, this Court has frequently stated its disinclination, "absent the most exceptional circumstances," to disturb or even to review "factual determinations in which the district court and the court of appeals have concurred." *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980). In any event, these findings are subject to a clearly erroneous standard and petitioners have failed to contend, much less show, that the findings were clearly erroneous.

3 "Br." refers to petitioners' brief. "Pet." refers to the appendix to the petition for certiorari which contains the opinions below. "J.A." refers to the Joint Appendix. "Tr." refers to the trial transcript. "R. Doc." refers to the record documents which contain, *inter alia*, the trial transcripts.

Fourth, petitioners ignore the finding that they kept the existence of the policy secret from claimants, their advocates, SSA's ALJs, and the courts. *Id.* at 39a, 42a, 62a.

Finally, petitioners do not acknowledge the finding that SSA tainted the appeals process by creating a record, relied on by ALJs, that falsely indicated that an actual assessment of ability to work had been conducted by doctors, when it had not. *Id.* at 62a.

2. The Respondent Class. The district court certified a class of mentally ill claimants whose applications for benefits had been denied or whose benefits were terminated between April 1, 1980 and March 15, 1983. The class was limited to those claimants whose psychiatric impairments the New York State Office of Disability Determinations ("state agency")[4] had found to be medically severe.

Many class members suffer from schizophrenia, a thought disorder which affects an individual's ability to organize the basic activities of life, including work. The disease renders individuals extremely vulnerable to stress. The result of SSA's policy was "particularly tragic in the instant case because of its devastating effect on thousands of mentally ill persons whose very disability prevented them from effectively confronting the system." *Id.* at 31a.[5] As the district court also found:

> Harm to members of the plaintiff class is irreparable. Loss of benefits is not the only damage termination causes to a mentally ill person. The ordeal of having to go through the administrative appeal process may trigger a severe medical setback. Many persons have been hospitalized due to the trauma of having disability benefits cut off. Pet. at 46a.[6]

4 Initial disability determinations are made by the state agency, acting under contract with and subject to the control of SSA. 42 U.S.C. § 421(a).

5 The district court found that some claimants became suicidal when their benefits were terminated or denied. Pet. at 37a-38a. Indeed, some months after the judgment of the district court, SSA informed counsel that one of the named plaintiffs, Richard Roe III, committed suicide after being advised—erroneously, it turned out—that his benefits might be cut off.

3. The Procedure for Evaluating a Claim of Disability. To be eligible for disability benefits, a claimant must show a lasting physical or mental impairment which precludes the ability to engage in substantial gainful activity. 42 U.S.C. §§ 423(d)(1)(A), (d)(2)(A), 1382c(a)(3)(A), (a)(3)(B). The Secretary has adopted a five-step sequential process to decide claims of disability. The process must continue through each step until a finding can be made that a claimant is, or is not, entitled to benefits. 20 C.F.R. §§ 404.1520(a); 416.920(a).

At step one, SSA determines whether a claimant is working; if so, benefits are denied. *Id.* §§ 404.1520(b), 416.920(b). At step two, SSA determines whether the claimant's condition is severe enough, based on the medical evidence alone, to "significantly limit" the ability to engage in "basic work activities." If not, benefits are denied. *Id.* §§ 404.1520(c), 416.920(c).

At step three, SSA determines whether the individual's signs, symptoms, and functional restrictions meet or equal the Listings of Impairments ("Listings"). *Id.* §§ 404.1520(d), 416.920(d); *see id.* Part 404, Subpart P, App. 1 (the Listings). The Listings specify conditions which are deemed to be so severe that their presence alone, without any assessment of actual ability to work, justifies a finding of entitlement to benefits. The Listings include only the most severe psychiatric impairments.[7]

6 The City and State of New York also sued to redress the financial injury to themselves (as well as to their citizens). The state and local governments' shelter programs, public assistance and social services system, and hospitals were over-burdened because of petitioners' clandestine illegal actions. For example, about 40 percent of the individuals who have been forced to live in the streets, and who use the City's crowded homeless shelters, are persons whose disability benefits were denied or terminated. Pet. at 49a; R. Doc. 74, Tr. at 263.

7 One of SSA's own medical consultants has acknowledged that:

> "[It is] practically impossible to meet the Listings . . . for any individual whose thought processes are not completely disor-

At step four, SSA is required to evaluate a claimant's residual functional capacity ("RFC"), that is, the ability to work despite the impairment. *Id.* §§ 404.1520(e), 416.920(e). The RFC is assessed by a review physician, employed by the state agency, who enters a conclusion on a form which becomes part of the administrative record of the claim. *See, e.g.*, Pl. Ex. 50 at 10; J.A. at 148, 158; R. Doc. 73, Tr. at 27. With respect to claims of mental disability, physicians are required to evaluate the claimant's "ability to understand, to carry out and remember instructions, and to respond appropriately to supervision, co-workers and work pressure." 20 C.F.R. §§ 404.1545(c), 416.945(c); *see also id.* §§ 404.1546, 416.946. The judgments of the review physicians are viewed as expert opinion evidence and are required to be given probative weight at all levels of the administrative review process. Def. Ex. BB; J.A. at 363, 365; R. Doc. 76, Tr. at 858. If SSA finds at step four that the claimant retains the capacity to do his or her past work, benefits are denied.

If the claimant cannot perform his or her past work, SSA must determine, at the final step, whether the claimant can perform other work available in the national economy. As SSA assured its psychiatrically impaired clients, "we will consider your residual functional capacity [as determined in step four] and your age, education and past work experience." 20 C.F.R.

ganized, is not blatantly psychotic, or is not having a psychiatric emergency requiring immediate hospitalization . . . In fact, an individual may be commitable due to mental illness according to the State's Mental Health Codes and yet found capable of 'unskilled work' utilizing our disability standards . . . ."

Statement of the Chicago Regional Medical Consultant, quoted in testimony by the General Accounting Office before the Senate Special Committee on Aging, April 7, 1983, Pl. Ex. 1 at 12; J.A. at 286, 296; R. Doc. 73, Tr. at 27, and quoted in *Mental Health Association of Minnesota v. Schweiker*, 554 F. Supp. 157, 162 (D. Minn. 1982), *aff'd*, 720 F.2d 965 (8th Cir. 1983).

In the Social Security Disability Benefits Reform Act of 1984, Congress required the Secretary to rewrite the Listings. Pub. L. No. 98-460 § 5(a), 42 U.S.C. § 421 note. The new regulations were promulgated August 28, 1985. 50 Fed. Reg. 35038.

§§ 404.1520(f), 416.920(f).[8] If the individual is found incapable of performing any such work, benefits are awarded.

The independent assessment of RFC at step four is of critical importance since it provides the only opportunity for a practical and medical examination of what work, if any, the claimant can do despite the limitations of the impairment. Step two (severity) is designed to screen out claims which, on the basis of medical evidence alone, are so insubstantial as to warrant no further review. Step three (the Listings), on the other hand, presumes that certain impairments are *per se* disabling. The RFC assessment is essential to evaluate claims of persons whose disabilities are severe but do not meet the Listings.

4. SSA's Violations of the Procedure Established by Its Regulations. After a seven-day trial, at which twenty-two witnesses were heard, the district court found that between 1978 and spring 1983,[9] SSA's central office enforced a policy that cut short the five-step sequential evaluation process and, contrary to the requirements of the statute and regulations, eliminated the step four RFC assessment. Pet. at 38a.[10] The

8 Petitioners incorrectly state that these decisions are ordinarily made by reference to SSA's medical-vocational guidelines. Br. at 8. Those guidelines do not direct decisions in mental impairment cases. 20 C.F.R. Part 404, Subpart P, App. 2, § 200.00(e)(1). Rather, the assessment remains individualized.

9 The district court found that the record could support July 1, 1983, as the end of the illegal policy, but that its termination was "likely" effectuated by May 15, 1983. Pet. at 65a n.*. Contrary to petitioners' present claims, they conceded below that the policy existed until March 31, 1983. Pet. at 65a n.*. Moreover, in earlier colloquy, petitioners' counsel had contended only that the date was "slightly earlier" than July 1, 1983. See Transcript of Proceedings, January 26, 1984, at 9, 11; Joint Appendix to the Second Circuit 149, 157, 159. Their reference here to a January 3, 1983 Memorandum, Def. Ex. M, Pet. at 69a, as when "decisive steps were taken to end" the policy is contradicted by counsel's admissions in the district court and by that of SSA's then Acting Chief Consultant in Psychiatry, who, during his deposition in April 1983, stated that the policy was still in effect. Pl. Ex. 61 at 102-03; J.A. at 337, 348-49; R. Doc. 75, Tr. at 615.

10 Another district court concluded that the policy challenged here violates the Act and the regulations and is "arbitrary, capricious,

district court relied on testimony by SSA's Regional Chief Psychiatrist, Dr. Anne Geller, that a professional medical judgment that a claimant "can't work" was regarded by SSA's central office as an "extraneous consideration." J.A. at 197. As the district court found, if an evaluation of RFC was done at all, it was "reduced to a paper charade where the SSA physician completed a cursory report or checked off a form knowing" the result in advance. Pet. at 61a.

Physicians were forced to deny benefits in many cases where, in the exercise of their independent professional judgment, they did not believe the claimant could work. *Id.* at 40a. As the district court found:

> SSA . . . pressured [physicians] to reach "conclusions" contrary to their own professional beliefs in cases where they felt, at the very least, that additional evidence needed to be gathered in the form of a realistic work assessment. *Id.* at 60a.

For example, Dr. Maurice Osinoff, a review psychiatrist who was responsible for making RFC assessments and who was called as a witness by petitioners, admitted that, under SSA's policy, in "many" cases benefits were denied despite the fact that he or one of the other physicians did not believe that the claimant could work. This result made him "uncomfortable" since it did not square with what he knew as a doctor. Pet. at 40a; J.A. at 254, 257.

SSA's Regional Chief Psychiatrist confirmed this conclusion. She testified that "we know very well from our experience in psychiatric clinics" that the individuals who were denied benefits were "not capable of responding to any kind of work situation on a sustained basis." J.A. at 183. Although it was "very clear they cannot work," SSA's central office rulings

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irrational, and an abuse of discretion." *Mental Health Association of Minnesota v. Schweiker*, 554 F.Supp. 157, 167. (D. Minn. 1982) (Larson, J.), *aff'd*, 720 F.2d 965 (8th Cir. 1983). That district court also ruled that the adjudicative process was so error-prone that due process required a pretermination hearing. *Id.* SSA did not appeal these rulings.

required denial of benefits. As Dr. Geller wrote, "Unfortunately, these are the guidelines we have to follow even though common sense and psychiatric experience dictate otherwise." Pl. Ex. 6; J.A. at 312, 314; R. Doc. 73, Tr. at 27. At trial, she characterized the instructions she received and was required to convey to the state agency as:

> telling me somewhat like Candide, in the best possible world these people can find employment and sustain employment, basically they do have the capacity in some fantasyland of getting and maintaining employment. J.A. at 196; Pet. at 40a-41a.

5. Enforcement of the Illegal Policy. The district court found that the unlawful policy was promulgated and systematically enforced by senior SSA officials by the transmission of internal memoranda and through the "quality assurance" process, Pet. at 39a-40a, 41a, thus keeping the policy "covert," "clandestine," and "*sub rosa*." *Id.* at 39a, 45a, 62a. These findings were not challenged on appeal; they were based on "overwhelming" evidence, *id.* at 39a, including a memorandum issued by SSA's Acting Chief Consultant in Psychiatry and its Associate Commissioner for Operational Policy and Procedures. *Id.* at 41a.

Quality assurance review ensures that state agencies and SSA regional offices follow SSA's national policies. SSA has the authority to reverse disability determinations made by a state agency. 42 U.S.C § 421(c)(1). When review by either SSA's regional or central office indicates an "error," that is, a decision that diverges from SSA policy, the case is returned to the state agency with instructions to reverse the decision. These returns become the precedents for future state agency decisions and are incorporated into the state agency's instructions to physicians, disability examiners, and specialists. Pet. at 35a.

The district court found that state agency adjudicators have a "strong incentive to conform" to central office policy, as reflected in the "returns," because individual careers and bureaucratic standing could suffer as a result of too many "mistakes." *Id.* The central office subjected the regional offi-

cials to the same pressures. As the Regional Chief Psychiatrist admitted, demerits from SSA's central office pressured physicians to act inconsistently with their professional medical judgment. J.A. at 170. Eventually, the professionals on the scene "lost the battle" to central office officials and succumbed to the pressure, R. Doc. 73, Tr. at 68, because:

> as someone working in the vineyards, I have to be responsible for the bureaucrats, I can't be a maverick and say these people can't work and sooner or later I'm not going to have a function within that bureaucracy. R. Doc. 73, Tr. at 70.

SSA's central office regularly returned as an error any grant of benefits in which the claims adjudicators had complied with the regulations by conducting an RFC assessment. Pet. at 39a. Whenever the state agency sought review of the policy behind the returns, the response was a clear statement that the policy was in effect and should be followed. For example, in November 1982, the central office responded to the state agency question, "When can a psychiatric claim be allowed [at step four or step five] due to restricted residual functional capacity . . . ?" with the answer "never." *Id.* at 39a-40a.

6. Concealment of the Illegal Policy. Although the policy was a change—indeed, an abrogation—of the regulations, it was never published as a new regulation, nor set out in any publicly available document.[11] Instead, when challenged, petitioners publicly denied that the policy existed. At first, in the course of defending a challenge to the policy in the Chicago region, *Mental Health Association of Minnesota v. Schweiker*, 554 F. Supp. 157, 158 (D. Minn. 1982), *aff'd*, 720 F.2d 965 (8th Cir. 1983), they simply denied its existence and then falsely represented that it existed only in that region. Pet. at 18a n.5. They made the same false representation to Congress. Pl. Ex.

[11] Although the district court here did not reach the issue, the district court in *Mental Health Association of Minnesota* held that the identical policy was a rule which was promulgated in violation of the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553. 554 F. Supp. at 157.

34; R. Doc. 73, Tr. at 27. In granting attorneys' fees in the Chicago region case, Judge Larson found that SSA withheld from that court relevant documents regarding implementation of the unlawful policy, and that the defense that SSA's central office policy was contrary to that applied in the Chicago region was "fundamentally untruthful." 620 F. Supp. 261, 267 (D. Minn. 1984), *appeal dismissed*, Nos. 84-5213-MN, 84-5221-MN (8th Cir. Dec. 12, 1984). Petitioners continued to deny the existence of the policy in the initial defense of the present litigation, contending that there was no policy, only an often-shifting adjudicative climate.

Claimants, their counsel, social workers, and SSA's own ALJs were kept unaware of SSA's subversion of its regulations. Pet. at 39a, 45a, 62a. Moreover, the notices of denial sent to claimants were misleading and wrongly suggested that an RFC evaluation had been conducted. For example, Richard Roe III was informed "your condition prevents you from returning to your usual job, however there are many other jobs you can do." Pl. Ex. 48; J.A. at 129, 137; R. Doc. 73, Tr. at 27. Since claimants were led to believe that an RFC assessment had been performed, many did not appeal.

The district court also found that, for those who did appeal, the process was tainted. As required by SSA policy rulings, Def. Ex. BB; J.A. at 363, 365; R. Doc. 76, Tr. at 858, and as confirmed by SSA's Deputy Chief Administrative Law Judge, the ALJs routinely gave weight to the RFC "findings" entered in the record. Pet. at 62a. They did not know that the RFC assessment was not based on medical judgments, but reflected the rules imposed upon the review physicians. As the Deputy Chief ALJ testified, had the ALJs known of the truth, they would have given no weight to the RFC findings. J.A. at 283. And, as the district court found, the results in many appeals might well have been different. Pet. at 62a.

7. The Limited Relief Ordered by the District Court. The court did not award benefits—nor had claimants asked for them. The court ordered petitioners to notify all class members that their claims were being reviewed and to redetermine their cases using the proper procedures. Petitioners were

ordered to reinstate benefits of class members whose benefits had been terminated until their eligibility is properly adjudicated by SSA. If SSA determines that the claimant is disabled, the claimant is to receive benefits retroactive to the date of the initial adverse decision. If SSA determines that the claimant is not disabled, the usual administrative appeal rights will follow. Pet. at 62a.

8. The Court of Appeals' Ruling on the Jurisdictional Issues. Petitioners did not challenge the central finding that " 'from 1978 until at least the early months of 1983,' SSA engaged in a covert policy to deny class members an individualized assessment of each claimant's capacity to engage in substantial gainful activity in violation of the strictures of the Social Security Act and regulations . . . ." Pet. at 7a. As they do here, petitioners argued that the district court had no jurisdiction to remedy the wrong to those individuals who did not exhaust the administrative process, and those who did not sue within 60 days after receiving a final agency decision.

The court of appeals, relying primarily on *Weinberger v. Salfi*, 422 U.S. 749 (1975), *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Heckler v. Ringer*, 104 S.Ct. 2013 (1984), rejected those contentions, holding that the final decision requirement had been met and that the time limitation had been tolled.[12] The court of appeals also upheld the remedy ordered by the district court. Pet. at 21a-23a. Petitioners no longer challenge the appropriateness of that remedy, apart from their contentions concerning jurisdiction.

12 The court of appeals rejected petitioners' argument that many, if not most, of the class members failed to satisfy the non-waivable "presentment" prong of § 405(g)'s requirement of a "final decision . . . after a hearing." Pet. at 10a-12a. Petitioners no longer dispute that all class members met this requirement. The court of appeals also held that mandamus jurisdiction is available as an alternative source of district court authority. *Id.* at 19a-20a. This holding also is correct, *see infra* Point III, although there should be no need to reach the question since § 405(g) jurisdiction is available. The court of appeals did not decide whether, as the district court held, petitioners had waived the statute of limitations defense by failing to raise it in a timely manner.

Petitioners sought rehearing in light of the passage of the Social Security Disability Benefits Reform Act of 1984 ("Reform Act"), Pub. L. No. 98-460, 98 Stat. 1794. The Reform Act, among other things, remanded for administrative reconsideration the claims of all named or unnamed members of pending class actions related to the medical improvement standard issue, *id.* § 2(d), and provided for a limited right of re-application for a group of mentally impaired individuals, including those with non-psychiatric impairments. *Id.* § 5(a). The court of appeals rejected the argument, which petitioners in part repeat before this Court, that "the Reform Act renders the finality and exhaustion requirements of § 405(g) more stringent than they were before the passage of the Act." Pet. at 26a. As the court said, the Reform Act was "remedial legislation" enacted to help large numbers of persons whose benefits had been terminated. It would be a "perverse view of Congressional intent . . . to infer . . . a determination on the part of Congress to deny other disability claimants the fruits of a judgment entered in their favor . . . ." *Id.*

SUMMARY OF ARGUMENT

The final decision and 60 day requirements of § 405(g) are necessary and proper, but they are not absolute. The courts have the power to excuse literal compliance with those requirements in certain rare situations. This case—in which an administrative agency subverted the administrative process, to the severe detriment of the disabled and disadvantaged, and concealed the wrong which it claims should have been timely brought to court for review—presents one such situation.

The court of appeals' ruling finding compliance with the final decision requirement without further exhaustion, and tolling the 60 day limitation period, is fully consistent with this Court's precedents. With respect to the final decision requirement, the Court has adopted an "intensely 'practical' approach," *Eldridge*, 424 U.S. at 331 n.11, requiring the examination of three factors—whether the traditional purposes

served by administrative exhaustion apply, whether the claimant is irreparably harmed by the challenged violation, and whether the issue as to which exhaustion is urged could be resolved in the administrative process. *See Salfi*, 422 U.S. at 765; *Eldridge*, 424 U.S. at 330-31. The court of appeals was correct in excusing exhaustion. Respondents challenged a procedural irregularity which could not be corrected through the usual channels of appeal and which was applied so as to cause irreparable injury to a large class of persons with severe psychiatric disabilities. Congress could not have intended that, where exhaustion serves no legitimate interest, claimants still be required to "travel through the administrative maze." Pet. at 15a.

The 60 day requirement, whether viewed as a statute of limitations or as a jurisdictional prerequisite, cannot, under the extreme circumstances here, be considered to bar the claims of the class members. In *Salfi* and *Eldridge*, this Court held that the 60 day requirement is a statute of limitations. Accordingly, the doctrine of equitable tolling operates to toll the 60 day period because petitioners concealed from, and, indeed affirmatively misled, the claimants concerning the existence of the procedural irregularity. Moreover, even if the 60 day provision could be regarded as jurisdictional, it did not commence running, or was extended by petitioners' failure to give notice of their reason for denying the class members' claims, and by their wrongful concealment of the illegal policy. Congress could not have intended that SSA could violate the law, conceal its wrongdoing and, by virtue of its own misconduct, insulate its policy from review and bar the mentally ill from relief.

Petitioners' arguments to the contrary are premised on their ignoring the findings of fact by the district court, as affirmed by the court of appeals, and on their mischaracterizing the nature of the issue in this lawsuit. Moreover, petitioners' positions are completely inconsistent with the administrative scheme of the Act. Under the scheme, as petitioners have previously represented and as this Court has assumed, SSA

functions as an unbiased adjudicator, not as an adversary of its infirm clients. Disability decisions are based upon "routine, standard and unbiased medical reports by physician specialists," and such decisions are made only after a "patient and careful endeavor . . . to ascertain the truth." *Richardson v. Perales*, 402 U.S. at 400-01, 403, 404. Disability claimants and their representatives are given "reasonable notice," including the "reasons" for a denial or cutoff of benefits so as to make a rational decision whether to appeal. *Eldridge*, 424 U.S. at 344, 345-46. The courts below correctly found that what actually occurred was utterly inconsistent with each of those assumptions. Unless petitioners are reserving a right to implement a secret, illegal policy again, all their concerns about the harmful precedential effects of the decisions below are hollow.

Finally, allowing SSA to escape the consequences of its past unlawful conduct would have two pernicious effects upon the future efficiency and fairness of any government entitlement program, particularly one the size and extent of the Social Security disability program. First, reversal of the lower court rulings would compel all future unsuccessful disability claimants to file protective administrative appeals and then judicial actions. Such protective steps would be necessary since failure to appeal within the system and to bring suit in the federal courts would bar subsequent judicial relief for the applicant, even as to unlawful policies he or she could know nothing about because petitioners concealed them.

The second pernicious consequence of reversal would be to encourage agency officials—already under intense pressure to reduce expenditures—to adopt and conceal legally questionable procedures for determining eligibility, secure in the knowledge that even when such procedures are ultimately discovered and rejected as unlawful, thousands of claimants will be excluded from judicial relief because they had failed to satisfy the requirements of § 405(g).

This Court should not and, under its own precedents, need not countenance such results.

ARGUMENT

I. FURTHER ADMINISTRATIVE EXHAUSTION WAS NOT REQUIRED IN ORDER TO CHALLENGE AN ILLEGAL AND SECRET PROCEDURAL RULE, IMPLEMENTED IN DEFIANCE OF MEDICAL JUDGMENT, NOT CORRECTABLE THROUGH THE USUAL CHANNELS OF APPEAL, AND APPLIED SO AS TO CAUSE IRREPARABLE INJURY TO A LARGE CLASS OF PERSONS WITH SEVERE PSYCHIATRIC DISABILITIES.

A. This Court's Analysis of the Final Decision Requirement of § 405(g) Supports the Result Reached Below.

1. The General Approach of this Court to Finality Under § 405(g). Section 405(g) provides that a claimant may obtain judicial review only of "any final decision of the Secretary made after a hearing." In *Salfi* and *Eldridge*, this Court held that while the final decision requirement is important, it is not absolute, and that these words should not be read in an overly narrow or "literal" sense. *Salfi*, 422 U.S. at 765.

Salfi and *Eldridge* divide the finality requirement into "two elements, only one of which is purely 'jurisdictional' in the sense that it cannot be 'waived.'" *Eldridge*, 424 U.S. at 328. The first, and nonwaivable, element is the requirement that a claim for benefits be "presented" to the agency. *Id.* Petitioners do not dispute that all class members satisfied this requirement. The second element, which by contrast is waivable, is "the requirement that the administrative remedies prescribed by the Secretary be exhausted." *Id.* In *Salfi*, the agency had waived further exhaustion; in *Eldridge*, the Court itself held that, notwithstanding the agency's objection, it could consider the adverse initial determination received by plaintiff there to constitute a final decision without the need for further administrative exhaustion.

In considering circumstances under which full exhaustion is not required, "the doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue." *Salfi*, 422 U.S. at 765. The Court has instructed lower courts to take an "intensely 'practical' approach" when deciding whether judicial excusal of full exhaustion is appropriate. *Eldridge*, 424 U.S. at 331 n.11. The approach embodies the core principle of all finality requirements that:

> statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered. *Id.*

In *Salfi* and *Eldridge* the court identified three factors that must be examined. First, courts should consider the traditional purposes served by exhaustion and whether they apply under the circumstances. In *Salfi*, this Court defined those purposes as:

> preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review. 422 U.S. at 765.

Requiring full exhaustion in this case will not further those purposes.

Even when these purposes may be served, *Eldridge* requires that courts consider the claimant's interests. 424 U.S. at 330. Thus, the court stated:

> But cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate. *Id.*

In holding that jurisdiction was appropriate despite Eldridge's conceded failure to exhaust the "full set of internal-review procedures," the Court placed weight on the fact that he:

> ha[d] raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in

a way not recompensable through retroactive benefits. *Id.* at 331.

This factor is entitled to even greater weight here, where the district court found that all class members were, and continue to be, harmed. Pet. at 42a, 62a.

Finally, courts should consider the nature and proper characterization of the issue—whether the claim presents a collateral issue. *See Eldridge*, 424 U.S. at 330; *Ringer*, 104 S. Ct. at 2021. To determine whether a claim is "collateral," a court considers if, "at bottom", it is a claim for benefits, *Ringer*, 104 S. Ct. at 2021, and whether it is "unrealistic" to expect further administrative review to resolve the issue. *Eldridge*, 424 U.S. at 330. Here, that the claim is procedural, and that it cannot be addressed (let alone resolved) in the administrative process, were properly considered by the courts below to weigh in favor of excusing further exhaustion.

This Court has not set any rigid requirements as to how to evaluate these factors. *Salfi* and *Eldridge* suggest that a balancing approach is appropriate. The central question is whether under all the circumstances the denial of benefits was "sufficiently final" to satisfy the purpose of the statutory finality requirement. *Eldridge*, 424 U.S. at 330. This approach has been adopted, with only semantic variations, by every circuit court of appeals to have squarely confronted the question.[13] Moreover, it reflects the remedial purposes of a statute which was enacted to "save men and women from the rigors of the poor house as well as from the haunting fear that such a lot

13 *See Caswell v. Califano*, 583 F.2d 9 (1st Cir. 1978); *Jones v. Califano*, 576 F.2d 12 (2d Cir. 1978); *Liberty Alliance of the Blind v. Califano*, 568 F.2d 333 (3d Cir. 1977); *Kuehner v. Schweiker*, 717 F.2d 813 (3d Cir. 1983), *vacated on other grounds*, 105 S. Ct. 376 (1984); *Ellison v. Califano*, 546 F.2d 1162 (5th Cir. 1977); *Blankenship v. Secretary of HEW*, 587 F.2d 329 (6th Cir. 1978); *Johnson v. Heckler*, 769 F.2d 1202, *reh. en banc denied*, 776 F.2d 166 (7th Cir. 1985); *Polaski v. Heckler*, 751 F.2d 943 (8th Cir. 1984), *petition for cert. pending*, No. 85-55; *Lopez v. Heckler*, 725 F.2d 1489 (9th Cir.), *vacated on other grounds*, 105 S. Ct. 583 (1984); *Reed v. Heckler*, 756 F.2d 779 (10th Cir. 1985); *Bartlett v. Schweiker*, 719 F.2d 1059 (10th Cir. 1983).

awaits them when journey's end is near." *Helvering v. Davis*, 301 U.S. 619, 641 (1937) (Cardozo, J.).

2. No Legitimate Purpose Would Have Been Served by Exhaustion. None of the factors which *Salfi* identified as supporting full exhaustion applies here. While petitioners stress the importance of these factors in the abstract, they do not begin to apply them to the facts of this case. However "carefully crafted," *Ringer*, 104 S. Ct. at 2025, Congress intended the administrative process to be, SSA by its own actions had so subverted it that it could not perform its proper function. Further exhaustion under these circumstances would, as the court of appeals recognized, have served no legitimate purpose. On the contrary, it would only further insulate the illegal policy from review. Pet. at 15a.

a. ***Exhaustion Would Not Afford the Parties and the Courts the Benefit of Agency Expertise.*** SSA officials suppressed the expertise within the agency by ignoring the protests of the regional and state agency psychiatrists against the policy. Moreover, with respect to individual cases, SSA suppressed expertise by "pressuring" the review psychiatrists to violate the regulations and to make decisions contrary to their best medical judgment. Pet. at 60a; *cf.* 20 C.F.R. §§ 404.1546, 416.946. In view of the deference owed and granted those decisions on administrative appeal, Def. Ex. BB; J.A. at 363, 365; R. Doc. 76, Tr. at 858, it would be brazen to insist here on exhaustion "to afford the parties and the court the benefit of [the agency's] experience and expertise." *Salfi*, 422 U.S. at 765.

b. ***Exhaustion Would Not Result in a Record Adequate for Judicial Review.*** To require that all class members have fully exhausted would not aid in "compil[ing] a record which is adequate for judicial review" of the wrongful policy. Moreover, the record for review of even the individual cases is polluted by fraudulent RFC assessments and by the absence of a truthful statement of the actual reasons for those decisions. *See Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943).

c. ***Exhaustion Would Not Enhance Agency Efficiency Nor Allow the Agency the Opportunity to Correct its Own Errors.*** Exhaustion is generally required to "prevent[ ] premature interference with agency processes so that the agency may function efficiently and have an opportunity to correct its own errors." *Salfi*, 422 U.S. at 765. Requiring exhaustion would not serve these interests. To the contrary, the Chicago region case and this action were necessary to force the agency to correct the illegal policy.

The policy challenged here could not have been, and in fact was not, reviewed in the administrative appeal process. Claimants did not know of the existence of the policy and hence were not able to challenge it. Moreover, claimants who did perfect individual appeals could assert only their individual claims for benefits. They sought to establish eligibility by proving to the ALJ that they met the statutory definition of disability, not by challenging the method by which the state agency evaluated the claim. That is precisely why *Eldridge* permitted waiver of exhaustion since there, as here, the claim was collateral in the most important sense, that the administrative process did not provide a context for its possible challenge. *See Mental Health Association of Minnesota v. Heckler*, 720 F.2d 965, 971 (8th Cir. 1983) ("The procedural irregularity . . . remains unaddressed despite exhaustion and despite an individual vindication.").

Furthermore, the implementation of the illegal policy tainted the administrative process. The record on appeal contained a copy of the false RFC assessment. ALJs, giving that assessment "great weight," could not tell from it that the illegal policy was in effect or, indeed, that the assessment had never been performed. For example, Richard Roe V's claim was denied at the state agency level and by the ALJ on the ground that he had sufficient RFC to return to his former work as a messenger. The record before the ALJ included evidence that he had been diagnosed as having paranoid schizophrenia, with recurrent agitation, pressured speech, disorganized thought process and persistent anger. He had been fired from his previous job because of hostility to co-workers. While taking

note of this evidence, the ALJ concluded that "the record is generally clear that the claimant could engage, as before, in such low stress work as a messenger." Pl. Ex. 50 at 7; J.A. at 148, 155; R. Doc. 73, Tr. at 27. The only "record evidence" that Richard Roe V could work was the sham RFC finding of the state agency physician.

To be sure, some claimants, despite the false statements in the record, successfully navigated the appeals process and obtained benefits. But the fact that some claimants succeeded despite a ball and chain affixed to their legs does not preclude relief to those who failed to complete the journey.

Petitioners' claim that they should have been given the "opportunity to correct their errors" is also belied by the fact that despite many opportunities to abandon their illegal and unprofessional policy, they steadfastly refused to do so until ordered by the district court in *Mental Health Association of Minnesota* and until after the filing of this lawsuit. Pet. at 39a. It is clear that the agency had reached a final decision with respect to the unlawful policy. Having ignored the protests of the state agency and regional physicians and experts, it would have been, as the court of appeals recognized, entirely unrealistic to expect that petitioners would have considered substantial changes in the policy in response to a challenge made by an individual claimant. Pet. at 15a (quoting *Eldridge*, 424 U.S. at 330). *Accord Mental Health Assocation of Minnesota*, 720 F.2d at 970 ("[A]lthough exhaustion may vindicate an individual claimant's interest, it is not likely to further distill agency policy."). As Justice Stevens has explained, when the Secretary has taken a firm position on the issue, "[t]here is no way that right can be vindicated in the administrative process." *Heckler v. Lopez*, 464 U.S. 879, 881 (1983) (dissenting from denial of request to vacate a stay), and, thus, exhaustion should not be required.[14]

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14 Other courts have followed this reasoning. *See, e.g., Kuehner v. Schweiker*, 717 F.2d 813, 817 (3d Cir. 1983), *vacated on other grounds*, 105 S. Ct. 376 (1984) ("[F]or statutory issues the court may waive exhaustion if the Secretary has taken a final position on them."); *Reed v. Heckler*, 756 F.2d 779, 785 (10th Cir. 1985).

3. The Nature of the Harm to Claimants Supports Waiver of Further Exhaustion. In *Eldridge*, the Court found that the plaintiff made a "colorable" claim that because of his physical condition and dependence on disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive benefits. This irreparable harm supported his claim that exhaustion should be waived. 424 U.S. at 331. The injury to the class members here was both more certain and more severe.[15] The court of appeals relied not only on the district court's finding that class members depended on their disability benefits, but also on its finding that requiring mentally disabled persons to pursue appeals in order to have their claims adjudicated under lawful procedures "would likely trigger 'a severe medical setback'." Pet. at 14a.

The harm in this case was irreparable also because the procedural irregularities—suppression of professional medical judgment, the entering of false statements in the record, and the misleading notices sent to claimants—would not be subject to review in the appeals process. Petitioners themselves acknowledge that where issues become "effectively unreviewable," claimants suffer irreparable harm. Br. at 38-39. That is precisely what this case is about.

Nowhere in their brief do petitioners contest these findings. Petitioners instead argue that this harm cannot be considered irreparable because "Congress has determined that a retroactive award of benefits is the appropriate statutory remedy for an erroneous loss of statutory benefits during the administrative appeals process." Br. at 29. This argument is flawed because in *Eldridge* the Court found that the injury caused by delay constituted irreparable harm. Even more important, Congress plainly did not envision that SSA would adopt a clandestine, illegal policy that produced thousands of errors

15 In contrast to the harm suffered by respondents, and to a lesser extent by Eldridge, the plaintiffs in *Ringer* who had presented claims to the agency did not suffer irreparable harm. Those individuals had already undergone the BCBR surgery and merely sought reimbursement for costs already incurred. At most, they suffered a delay in securing benefits, which, unlike the benefits at issue in *Eldridge* or here, were not subsistence benefits.

and it did not intend the courts to ignore the massive harm caused by this systematic failure.

4. The Collateral Nature of the Claim Also Supports the Result Below. Respondents challenged the method of adjudicating claims, not the substantive standards or criteria applied to those claims. Respondents also alleged that the secret application of this illegal procedure violated their right to due process.[16] These issues are fundamentally procedural ones; they are not claims for benefits. The district court's holding that the method of determining eligibility was illegal does not mean that any class member will actually receive benefits, only that lawful procedures will be used to make that determination.[17] Second, as we have shown, as in *Eldridge*, the administrative process could not resolve the procedural challenge.

For these reasons, the claim here differs from the issue in *Ringer*, which was, "at bottom," a claim for benefits. There the declaration sought by plaintiffs—that a particular surgical procedure was "reasonable and necessary" for treatment of a particular ailment, thereby making it reimbursable under the Medicare program—would determine their claims for benefits. Were the plaintiffs to prevail and be granted the declaration they sought, "only essentially ministerial details [would] remain before [plaintiffs] would receive reimbursement." 104 S. Ct. at 2022. Under such circumstances, the claim for declaratory relief could not be viewed as collateral to the benefit claims. *Id.* at 2022-23.

16 Claimants raised a substantial constitutional claim which, although not adjudicated, would support jurisdiction to determine the statutory claims. *See Hagans v. Lavine*, 415 U.S. 528, 536, 543 (1974); *Rosado v. Wyman*, 397 U.S. 397, 402-405 (1970). The respondent class alleged that the promulgation of the wrongful policy without proper notice denied them due process of law. *See White v. Roughton*, 530 F.2d 750, 754 (7th Cir. 1976) (per curiam); *Hornsby v. Allen*, 326 F.2d 605, 610 (5th Cir. 1964). The district court here did not reach the constitutional issue because its conclusion that the policy violated the Act obviated that need. Pet. at 61a.

17 When the claims of the class members in *Mental Health Association of Minnesota* were redetermined, slightly more than half of the claimants received benefits. 620 F. Supp. at 260.

This Court's recent statement that claims are to be considered to be collateral or "entirely separable" when they are conceptually distinct, even though they arise from the same set of facts, reinforces the conclusion that respondents have asserted a collateral claim. *Mitchell v. Forsyth*, 105 S. Ct. 2806, 2815-17 (1985). *Mitchell* is the most recent case interpreting the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The issue in *Mitchell* was whether a former government official could immediately appeal, pursuant to the collateral order exception, the denial of a defense of qualified immunity. The Court acknowledged that, even though there was some factual overlap, the immunity defense was "conceptually distinct" from the underlying merits of whether the defendant violated plaintiff's rights. 105 S. Ct. at 2816.

Here too, respondents' claim of procedural impropriety is conceptually distinct from their individual claims for benefits. The inquiry involved in adjudicating the legality of the procedure is fundamentally different from whether a particular respondent is eligible for benefits. In adjudicating their allegation that petitioners violated the Act and regulations, the district court did not have to determine or even examine the merits of individual claims for benefits. As the court of appeals recognized, any factual overlap was incidental to the demonstration of the existence of the general policy.[18]

* * * *

18 The court of appeals' characterization of the claim here as "substantially collateral," and not "wholly" or "entirely" collateral, is of no import. Pet. at 14a. The fundamental analysis of the court of appeals on the nature of the claim is consistent with the analysis of *Eldridge* and *Ringer*. The court of appeals considered the issue to be substantially collateral in that it is of "a procedural irregularity and not . . . the Secretary's substantive standards of eligibility," and because the policy would be unreviewable in the administrative process. Pet. at 14a-15a. In this case it is, of course, true that procedural steps in the administrative process are related to the ultimate outcome of class members' claims for benefits, but only in the sense that the procedural violations found absolutely precluded benefits for class members by denying them a fair assessment of their claims. Application of the proper procedural rules, as the district court ordered, does not dictate outcomes in individual cases. This fact, and the fact that the policy could not be reviewed in the administrative process, show that the issue is collateral in the only sense that matters.

Stepping back from the separate elements of the analysis and looking at the broader considerations underlying the decision in *Eldridge* confirms the correctness of the result reached below. It would exalt form over substance to hold that the exhaustion doctrine forces claimants to resort to an administrative process to challenge an illegal policy about which they knew nothing and which ALJs were powerless to change. Exhaustion under these circumstances could not be what Congress intended.

B. Petitioners' Understanding of this Court's Exhaustion Doctrine is Incorrect.

Not only is petitioners' assault on the court of appeals' ruling premised on a mischaracterization of what was at issue below, and not only does it ignore the findings of fact upon which the lower court rulings were predicated, but it embodies an erroneous understanding of this Court's exhaustion doctrine and of how that doctrine should be applied to the facts of this case.

1. Petitioners argue that the fundamental flaw in the approach of the court of appeals is its "inconsisten[cy] with the text of the Act . . . and this Court's decisions in *Salfi* and *Ringer*." Br. at 26. This argument immediately fails because it is premised on the incorrect view that the case was brought to challenge individual denials of claims. *Id.* at 27. Moreover, reliance on the "text" of the Act is of no help since *Eldridge* interpreted the text petitioners rely upon as allowing judicial waiver of exhaustion under the very approach the court of appeals applied here.[19] And petitioners' reliance on *Salfi* and

19 Petitioners make much of the point that the § 405(g) exhaustion requirement is statutorily created, as if that fact cuts decisively in their favor. Br. at 27-29. *Eldridge*, however, acknowledged the statutory source of the § 405(g) exhaustion requirement, yet sanctioned the principle that it could be waived. 424 U.S. at 330-31. *See generally* L.

Ringer is equally misplaced. *Salfi* held that the agency could waive the exhaustion requirement when it deemed recourse to the administrative process to be "futile and wasteful." 422 U.S. at 767.[20] But it did not suggest that courts could not, under certain circumstances, such as those identified in *Eldridge*, excuse further exhaustion—which is the aspect of the final decision doctrine respondents rely upon here. *Ringer* reaffirmed this test, holding only that the three plaintiffs there who had presented their claims had not received final decisions.

Petitioners similarly criticize the court of appeals for relying on a case-by-case balancing test. That approach is mandated by *Eldridge* and *Ringer* and is subject to definite, well-established criteria, capable of uniform application. Hence their attack on the court of appeals' decision as "*ad hoc*" and "standardless" bespeaks both a misunderstanding of *Ringer* and *Eldridge* and an unreasoned absolutism inconsistent with this Court's precedents.[21]

Jaffe, *Judicial Control of Administrative Action* 426 (1965) (statutes should not be read to embody a rule of exhaustion which excludes the application of traditional equitable considerations), cited in *Eldridge*, 424 U.S. at 331 n.11.

Moreover, since the "text" refers to "any" final decision, it is less limiting than other finality provisions that might have been adopted. *See, e.g., Garcia-Mir v. Smith*, 766 F. 2d 1478, 1489 (11th Cir. 1985).

20 There is dictum in *Salfi* that "exhaustion . . . may not be dispensed with *merely* by a judicial conclusion of futility." *Salfi*, 422 U.S. at 766 (emphasis added). Far more than mere futility has been shown here. When the Court reached this question in *Ringer*, it conducted its own independent examination of whether exhaustion would have been futile, in light of the fact, among others, that the three plaintiffs who had presented claims had failed to show that ALJ review of their claims might not have been successful.

21 *See, e.g., Winston v. Lee*, 105 S. Ct. 1611, 1616-18 (1985) (determining the reasonableness of a surgical intrusion to recover evidence by a "case-by-case" application of the three part "balancing test" of *Schmerber v. California*, 384 U.S. 757 (1966)); *Moses N. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 16 (1983) (propriety of abstention determined by "a careful balancing of the important factors as they apply in a given case"); *McKart v. United States*, 395 U.S. 185, 197 (1969) (whether governmental interests in

2. Petitioners misread *Ringer* in arguing that this Court rejected the possibility of distinguishing between a complaint of "procedural irregularity" and one regarding "substantive standards of eligibility," as the court of appeals did. Br. at 29-30. In *Ringer*, the Court rejected the validity of the procedural/substantive distinction only with respect to whether the claims of the plaintiffs "arose under" the Act, so as to preclude review under 28 U.S.C. § 1331. 104 S. Ct. at 2021-22. It did not disavow the legitimacy of the distinction as to the different question of whether exhaustion could be waived as to claims, like those here, brought under § 405(g). *Id.* at 2023. While *Ringer* cautioned against placing a procedural label on what at bottom is a claim for benefits, it recognized that, as in *Eldridge*, the procedural nature of a claim supports excusal of exhaustion. *Id.*

3. Petitioners incorrectly assert that § 405(g) incorporates the precise elements of the collateral order exception to the 28 U.S.C. § 1291 final judgment rule. In deciding whether or not to waive exhaustion, courts must have "regard for the particular administrative scheme at issue." *Salfi*, 422 U.S. at 765. Moreover, in *Eldridge*, the Court recognized that not all of the policies underlying § 1291 are relevant to § 405(g). 424 U.S. at 330 n.11. The Court referred only to *Cohen's* "core principle," that finality requirements should be construed so that crucial collateral claims are not lost and potentially irreparable injuries not suffered. *Id.*

Moreover, *Eldridge* pointed also to 28 U.S.C. § 1257 as exemplifying these fundamental principles. The finality requirement of § 1257 has been construed liberally because,

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exhaustion of administrative remedies "outweigh" petitioner's interest in being able to raise claim as a defense in criminal trial). That the balancing must be performed on a case-by-case basis by the lower courts hardly renders it "standardless" or "unclear." *See generally* Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 Colum. L. Rev. 1022, 1037-46 (1978).

unlike § 1291, it is "untempered by the many devices for interlocutory review available in the federal system." 9 *Moore's Federal Practice* § 110.10 at 137 (1985). *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474 (1978). If, as petitioners urge, the Court should look to the details of § 1291 for guidance, it is as appropriate to look to § 1257, which still requires the very practical analysis of whether the claim would be lost if not immediately appealed. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477, 481-85 (1975); *North Dakota Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159-64 (1973).

In any event, the three elements of the "collateral order" exception are satisfied here. The *Cohen* rules require that the non-final order must (a) conclusively determine the disputed question, (b) resolve an important issue completely separate from the merits of the action and (c) be effectively unreviewable on an appeal from a final judgment. *Richardson-Merrell, Inc. v. Koller*, 105 S. Ct. 2757, 2761 (1985). Class members sought judicial review of the agency's illegal actions which conclusively denied their rights to a realistic individual assessment of ability to work at the initial and reconsideration levels. The issue of the lawfulness of that denial is conceptually distinct from, and hence completely separate from, the merits of their claims for benefits. *See Mitchell*, 105 S. Ct. at 2816, 2817 n.10. Finally, the issues of the existence and legality of the agency's policy were unreviewable as part of an individual appeal. Neither claimants nor the upper layers of the administrative process had notice of the existence of the policy. Furthermore, the harm caused by the policy—the loss of a fair and appropriate consideration at the initial levels—cannot be remedied by appealing the denial of the claims for benefits.

4. Petitioners' attempt to illustrate the benefits of exhaustion by pointing to the experiences of the named plaintiffs also fails. Those experiences illustrate that, by enforcing the unlawful policy at the initial and reconsideration stages and by tainting the appeals process, the agency turned the quest for benefits into a game of chance, one whose rules were skewed against the claimants.

For example, Jane Doe I, whose benefits were terminated, appealed to the ALJ and was found to have a non-severe impairment. This finding was later reversed by the district court, which tried her individual case in conjunction with the class action, and found that her impairment was severe and that she had been subjected to the illegal policy. The district court granted her class relief.

Richard Roe V had his possibility of a fair appeal tainted by the fraudulent RFC assessment in his file. *See supra* at 20-21. Petitioners attempt to find this claim non-illustrative because the denial was at step four, not at step five. Br. at 33 n.9 This is a distinction without a difference since both steps depend on the RFC assessment.

Finally, Jane Doe II, Richard Roe II and Richard Roe IV did ultimately succeed on appeal. That they did so, however, did not resolve nor remedy the illegal policy nor can it begin to justify the handicaps they faced because of the tainted record.[22]

5. Petitioners seek to buttress their understanding of § 405(g) by referring to the 1984 Reform Act, and to the Senate committee report written in conjunction with the Senate's proposed bill. The Senate interpretation of § 405(g), however, was rejected by the House. The Conference Committee refused to adopt the Senate view, and stated that it expressed no view one way or the other concerning the proper judicial interpretation of the exhaustion and 60 day aspects of

22 Petitioners cite the case of Richard Roe I as an example of a claimant who was denied benefits on grounds unrelated to the illegal policy. Petitioners do not refer to the application for benefits which was subject to the illegal policy, however, but to an earlier one.

§ 405(g). H. Rep. No. 1039, 98th Cong., 2d Sess., *reprinted in* 130 *Cong. Rec.* H9821, H9828 (daily ed. Sept. 19, 1984). *See Heckler v. Day*, 104 S. Ct. at 2255-56.

Petitioners also assert that by granting in the Reform Act certain relief to disabled claimants who were harmed by the various wrongful policies of the Secretary, regardless of whether they were victims of the policies at issue, Congress limited the relief available here. Br. at 25 n.8. To infer that the grant of a remedy to others necessarily contracts the relief granted by a court to those who proved that they were victims of a particular unlawful policy would turn Congressional intent upside down. The court of appeals was surely correct to call petitioners' theory "perverse." Pet. at 26a.

6. Finally, petitioners describe the class members who did not fully exhaust their administrative remedies as having "knowingly abandoned" their claims. Br. at 34. And they contend that "there are no equitable considerations that could justify a court order requiring the Secretary to divert scarce resources from the adjudication of claims of other persons who *have* pursued their administrative remedies" to adjudicating the claims of these respondents. *Id.* The equities of this case, when properly considered, however, would dictate that the adverse decisions received by class members are final decisions, as to which judicial review is essential.

Far from knowingly abandoning their claims, the rational claimant or his or her advocate, when viewing the misleading notices and false record compiled by the agency, would have understandably decided against appealing. For others, "[t]he ordeal of having to go through the administrative appeals process . . . [would] trigger a severe medical setback." Pet. at 46a. To penalize this group of respondents for their failure to exhaust, when SSA acted in a way which precluded them from doing so and when they were incapable of doing so, is inconsistent with the remedial purposes of the Act.[23] And if the equities are to be balanced, it is surely inequitable to allow the agency to escape the consequences of its wrongdoing.

II. THE 60 DAY REQUIREMENT DOES NOT BAR RELIEF WHERE PETITIONERS' MISCONDUCT IMPEDED THE TIMELY FILING OF ACTIONS FOR JUDICIAL REVIEW.

Whether viewed as a statute of limitations or as a jurisdictional prerequisite, the requirement that judicial relief be sought within 60 days of a final decision does not bar the claims of the class members. In *Salfi* and *Eldridge*, this Court held that the 60 day requirement is a statute of limitations and is therefore subject to waiver. Accordingly, the doctrine of equitable tolling is applicable and operates to toll the 60 day period because petitioners concealed from and affirmatively misled the claimants concerning the policy of preventing an individualized determination of RFC by the state agency physician. Moreover, even if the 60 day provision could be regarded as jurisdictional, it did not commence running because of petitioners' failure to give adequate notice of their reason for denying the class members' claims.

Petitioners place primary reliance on the principle that waivers of sovereign immunity should be strictly construed. However, the extent of a waiver of sovereign immunity turns upon the intent of Congress. Here, the statutory scheme as a whole, the language of the statute and, most importantly, the nature of petitioners' wrongdoing support the result reached below. Congress could not have intended and did not intend to

23 Penalizing the mentally ill for not taking certain steps when they were not competent to do so may also be unconstitutional. *Parker v. Califano*, 644 F.2d 1199 (6th Cir. 1981); *Shrader v. Harris*, 631 F.2d 297 (4th Cir. 1980). This Court need not rule that the SSA's insistence that a mentally ill claimant exhaust his administrative remedies when the claimant was not competent to do so violates that individual's due process rights. It need only recognize that this harm should be given weight in balancing the factors identified by *Salfi* and *Eldridge*.

permit SSA to violate the law, lie to claimants, conceal its wrongdoing, and by virtue of its own misconduct, bar the mentally ill from relief.

A. The 60 Day Provision Is A Statute of Limitations and, Pursuant to Principles of Waiver and Equitable Tolling, Does Not Bar Relief Here.

1. The 60 Day Provision Is A Statute of Limitations. Section 405(g) provides that a claimant "may obtain a review of [the Secretary's] decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow." In *Salfi*, this Court held that this filing period is "a statute of limitations" waivable by the parties and that the Secretary had waived the defense by not raising it in a timely manner. 422 U.S. at 764. In *Eldridge*, the Court reaffirmed its understanding that the 60 day requirement is a "statute of limitations" and hence waivable by the parties if not raised. 424 U.S. 319, 328 n.9. A majority of the circuits have since held that the 60 day provision is a statute of limitations.[24] The court of appeals correctly held that the 60 day limitation period contained in § 405(g) was not a jurisdictional restriction and was tolled here by the Secretary's own misconduct.

Petitioners nevertheless contend that the 60 day period is a jurisdictional bar if not met because it runs against the sovereign. This position not only ignores the holding of *Salfi*[25] and

24 In addition to the decision of the Second Circuit, see *Johnson v. Heckler*, 769 F.2d 1202, 1209, *reh. en banc denied*, 776 F.2d 166 (7th Cir. 1985); *Lopez v. Heckler*, 725 F.2d 1489, 1505 (9th Cir.), *vacated on other grounds*, 105 S. Ct. 583 (1984); *Mental Health Association of Minnesota v. Heckler*, 720 F.2d 965, 973 n.19 (8th Cir. 1983); *Hatchell v. Heckler*, 708 F.2d 578, 580 n.1 (11th Cir. 1983); *Rowland v. Califano*, 588 F.2d 449 (5th Cir. 1979). *Contra*, *Hyatt v. Heckler*, 757 F.2d 1455 (4th Cir. 1985), *petition for cert. pending* No. 85-474; *Biron v. Harris*, 668 F.2nd 259, 261 (6th Cir. 1982). *Biron*, however, recognized that actions of the Secretary may constitute "an implicit extension of the filing limitation." *Id.*

25 Petitioners seek to characterize the holding in *Salfi* as mere dictum because it is their view that the plaintiff in *Salfi* timely filed. But that was not the ground of the decision in *Salfi*; rather, the Court held that the agency had never raised plaintiff's failure, if any, to file for judicial review in a timely manner and that that defense was therefore waived. 422 U.S. at 764. Thus, *Salfi* clearly and necessarily held that the 60 day limitation was waivable and not "purely jurisdictional." *Eldridge*, 424 U.S. at 328 n.9. In any event, where a decision rests on more than one possible ground, neither can be considered dictum. *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949). Indeed, "each is the judgment of the court and of equal validity with the other." *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 486 (1924) (quoting *Union Pacific R.R. Co. v. Mason City & Fort Dodge R.R. Co.*, 199 U.S. 160, 166 (1905)).

its reaffirmation in *Eldridge*, but fails to recognize that the inquiry is not merely whether sovereign immunity is involved, but the scope of Congress' waiver of that immunity. *Franchise Tax Board of California v. United States Postal Service*, 104 S. Ct. 2549 (1984); *United States v. Mitchell*, 463 U.S. 206 (1983); *Lehman v. Nakshian*, 453 U.S. 156 (1981); *Honda v. Clark*, 386 U.S. 484 (1967). The critical question, then, is "whether tolling the limitation in a given context is consonant with the legislative scheme." *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 558 (1974). Since Congress' intent is foremost, "the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *Id.* at 559.

On its face, § 405(g) contains no absolute time limitation. To the contrary, it specifically provides for extensions of time ("*. . . or within such further time as the Secretary may allow*" (emphasis added)). Thus, § 405(g) is unlike the statutes in the cases on which petitioners principally rely, *Finn v. United States*, 123 U.S. 227 (1887); *Munro v. United States*, 303 U.S. 36 (1938), cited at Br. at 42-43, and has all the characteristic flexibility of a statute of limitations and none of the facial indicia of a strict jurisdictional restriction.

The legislative history of § 405(g) also supports the holding in *Salfi* that the 60 day provision is a statute of limitations. Congress' decision to permit extensions of the time limit for

review was but one aspect of its enlargement of the role of judicial review[26] and stands in marked contrast to other New Deal legislation that established absolute time limitations for the review of agency action.[27] This choice of flexible filing provisions was consistent, moreover, with the exclusively remedial purpose of the Act—to provide a federal pension program "for the decent support of elderly workmen who have ceased to labor." *Social Security Board v. Nierotko*, 327 U.S. 358, 364 (1946). *See also Helvering v. Davis*, 301 U.S. 619, 641 (1937). Its administration was designed to be "unusually protective" to claimants and to be not only "orderly" but "sympathetic." *Heckler v. Day*, 104 S. Ct. 2249, 2251 (1984).

Further, the entire statutory scheme—of which the time limitation provision is a part—is designed to give claimants a fair chance to obtain benefits owed them by law by eliminating any possible procedural traps for the ignorant or unwary. This purpose is reflected in the obligation of the Secretary to aid

26 For example, while the Chairman of the Social Security Board, A.J. Altmeyer, believed that a "right to review as regards all question of law" was necessary, he proposed a very narrow scope of review which would have precluded any review of questions of fact. *See* Hearings Relative to the Social Security Act Amendments of 1939 Before the House Committee on Ways and Means, 76th Cong. 1 at Sess., Vol. II, at 2288. Congress expanded Altmeyer's proposal to enlarge the role of the courts by providing for review of fact issues as well. In addition, Congress broadened the review that would have been available under 28 U.S.C. § 1331 by eliminating the "amount in controversy" requirement, which then applied under that section.

27 *See, e.g.*, Securities Act of 1933, 15 U.S.C. § 77i (1982) (60 days from entry); Trust Indenture Act of 1939, 15 U.S.C. § 78y (same); Public Utility Holding Company Act of 1935, 15 U.S.C. § 79x (same); Investment Company Act of 1940, 15 U.S.C. § 80a-42 (same); Investment Advisers Act of 1940, 15 U.S.C. § 80b-13 (same); Fair Labor Standards Act of 1938, 29 U.S.C. § 210 (same); Agricultural Adjustment Act of 1935, 7 U.S.C. § 608c(15)(B) (as amended) (20 days). The only other legislation containing language similar to that in § 405(g) was the Railroad Unemployment Insurance Act of 1938, 45 U.S.C. § 335(f). Congress subsequently adopted similar provisions in the 1946 Amendments to the Railroad Retirement Act, 45 U.S.C. § 231(g).

individuals seeking authorized benefits[28] and, more generally, in one of the distinctive features of the Act, its non-adversarial nature. *Richardson v. Perales*, 402 U.S. 389, 403 (1971). Consistent with this scheme, Congress gave SSA the administrative authority to extend judicial filing deadlines in order to help claimants cope with the difficulties of practice before an often geographically distant and certainly unfamiliar federal court.

Petitioners argue that because an officer cannot waive sovereign immunity, he cannot waive a failure to comply with a time period for judicial review. Br. at 42-43, citing *Finn v. United States*; *Munro v. United States*. That is a correct statement of the law. What petitioners fail to appreciate, however, is that in § 405(g), unlike the Tucker Act, Congress specifically waived that immunity by permitting an extension of time otherwise impermissible under *Finn*. *See also Mathews v. Diaz*, 426 U.S. 67, 76-77 & n.11 (1976). Even where there is no such explicit authority to waive conditions in a statute creating liability against the government, those conditions are not necessarily jurisdictional where the purpose of the statute so indicates. *Honda v. Clark*, 386 U.S. 484, 1501 (1967). *See Hoiness v. United States*, 335 U.S. 297, 302 (1948) (place of filing provision is not jurisdictional and may be waived); *United States v. Hvoslef*, 237 U.S. 1, 11-12 (1915) (same).[29]

28 *See, e.g., Todd v. Heckler*, 736 F.2d 641 (11th Cir. 1984); *Robinson v. Secretary*, 733 F.2d 255 (2d Cir. 1984); *Milton v. Schweiker*, 669 F.2d 554 (8th Cir. 1982); *Deblois v. Secretary*, 686 F.2d 76 (1st Cir. 1982); *Coulter v. Weinberger*, 527 F.2d 224 (3d Cir. 1975).

29 Also inapposite is the petitioners' reliance on Justice Stevens' opinion in stay proceedings in *Heckler v. Lopez*, 464 U.S. 879, 881 (1983); Br. at 42. In *Lopez*, the only argument presented for tolling the 60 day rule was that a constitutional claim was raised which, by itself, is not a sufficient basis to toll the time limitation. *See* Opposition to Application for a Temporary Stay and a Stay Pending Appeal to the United States Court of Appeals for the Ninth Circuit, *Lopez v. Heckler*, No. A-145, October Term, 1983. Moreover, in plenary decisions, both before and after *Lopez*, Justice Stevens reiterated his understanding that the 60 day provision is a statute of limitations. *Ringer*, 104 S. Ct. at 2033 n.25 (Stevens, J., dissenting); *Norton v. Mathews*, 427 U.S. 524, 536 n.4 (1976) (Stevens, J. dissenting).

In sum, the language and legislative history of § 405(g), read in light of the purposes of the Act and of the purpose of the time limitation for judicial review, all point to the conclusion that it is not jurisdictional, just as this Court has twice held.

2. The 60 Day Statute of Limitations, Not Having Been Preserved as an Affirmative Defense, Was Waived by Petitioners. The court of appeals did not reach the issue whether the defense of the statute of limitations had been waived, but the district court found that since petitioners did not properly raise the limitations period as a defense, it was waived. Pet. at 59a; Fed. R. Civ. P. 8(c), 12(h)(1). Petitioners note that their trial attorney mentioned the issue in his opening statement. It is undisputed, however, that petitioners' answer contained no affirmative defense based on a statute of limitations, and at trial petitioners neither argued this point nor made any oral motion with respect to it. Moreover, petitioners never moved to amend their answer to plead such an affirmative defense, and the issue was never "tried by express or implied consent of the parties." Fed. R. Civ. P. 15(b). *See Mathews v. Diaz*, 426 U.S. at 76-77 n.11. While amendments to pleadings are liberally granted, the government, like any other party, must conform to the rule that an affirmative defense, if not properly pleaded or otherwise raised, is waived. Accordingly, the district court correctly held that here, as in *Salfi*, petitioners waived the statute of limitations defense.

3. The 60 Day Statute of Limitations Was Tolled by Petitioners' Inequitable Conduct. In determining whether tolling applies, courts should analyze "the statutory scheme as devised by Congress, in the context of [the particular] factual setting" so as to determine the "result most consistent with the legislative purpose of [the] Act." *Honda*, 386 U.S. at 495. Here the particular "factual setting"—petitioners' concealment from claimants of the illegal policy—when assessed in the context of a statute whose purpose is to help claimants obtain benefits to which they are entitled, clearly demonstrates that the statute of limitations was properly tolled under equitable principles.

It is well established that where defendants "kept secret and concealed from the parties interested the fraud which is sought to be addressed," the statute of limitations may properly be tolled. *Bailey v. Glover*, 88 U.S. (21 Wall) 342, 343-49 (1874). Accordingly, when Congress has enacted statutes of limitations that are silent on the issue of tolling, this Court has held that the statute was "presumably enacted with the rule of that case [*Bailey v. Glover*] in mind." *Exploration Company Ltd. v. United States*, 247 U.S. 435, 449 (1918). Indeed, in *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946), this Court held that the equitable doctrine of tolling due to fraudulent concealment set forth in *Bailey* and *Exploration Company* is "read into every federal statute of limitation."[30]

The statutory scheme, concerned as it is with equity and fairness to claimants, supports the application of equitable principles the Court has recognized in the context of other remedial statutes. These principles include tolling for (a) affirmative misconduct, (b) conduct which lulled claimants into inaction, and (c) inadequate notice. *Baldwin County Welcome Center v. Brown*, 104 S. Ct. 1723, 1725-26 (1984). Indeed, SSA's regulations governing extensions of time for filing recognize the propriety of those equitable principles, for they consist almost exclusively of considerations relating to fairness to claimants: situations where, because of illness, accident, destruction of records, or mistakes, the suit was not timely filed; situations where the claimant misunderstands the appeal process or is unable to collect necessary information on time; and circumstances where the Secretary fails to notify the claimant properly or where "*our action misled you*." 20 C.F.R. §§ 404.911, 416.1411 (emphasis added). These criteria demonstrate that, even in the agency's view, the statute authorizes extensions of time to file for review based on considerations of fairness to claimants. Thus, the consistency of equitable tolling principles with the statutory scheme cannot seriously be disputed.

30 The principle that concealment of the wrong complained of tolls the statute of limitations is applicable regardless of whether or not the statute is phrased as running only from when the claim "accrues." *See Exploration Company*, 247 U.S. at 447.

In *Honda*, the Court tolled a statute of limitations in a suit against the sovereign by application of equitable principles in harmony with the statutory scheme at issue there, concerning claims based on assets seized during World War II. Justice Harlan, writing for the Court, relied on three factors in support of that conclusion. The first was that the time limitation at issue was designed by Congress to further the "fair and equitable distribution of . . . assets to American residents," rather than to act "primarily as a shield for the Government." 386 U.S. at 495-96. The second was that the reasons why the petitioners had delayed in bringing suit were entirely reasonable ones. *Id.* at 490-93, 499-500. The third was that the government knew or should have known that its own conduct, even if undertaken in good faith, was in part responsible for plaintiffs' delay. *Id.* at 490.[31]

A similar analysis yields the conclusion that equitable tolling was correctly applied to the facts of this case. The courts below both recognized that petitioners' conduct here seriously compromised the scheme Congress established respecting eligibility determinations for disability benefits. Its effects, moreover, were magnified by the manner in which the short-cutting of the expected scheme took place. Even though baseless or arbitrary,

31 The Court suggested as well that the claims were not for money against the United States, but for assets in which the government had no interest. This feature cannot distinguish the case, however, since sovereign immunity is not only about the protection of the treasury, but about the ability to bring the sovereign into court at all, "to restrain the Government from acting, or to compel it to act." *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 703 (1949). Moreover, to the extent class members here are ultimately seeking money, they are in a situation more similar to the *Honda* plaintiffs, in that they are seeking payments to which they have an entitlement and which come out of a specified fund appropriated by Congress, than they are to a party seeking damages against the United States, *Springdale Convalescent Center v. Mathews*, 545 F.2d 943, 950-51 (5th Cir. 1977). In any event, the Social Security Act waives sovereign immunity with respect to retroactive benefits upon "final judgment of any court of competent jurisdiction." 42 U.S.C. § 405; *see also* 42 U.S.C. § 404(i). *Wright v. Califano*, 603 F.2d 666, 670-72 (7th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Jimenez v. Weinberger*, 523 F.2d 689, 702 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). *See Eldridge*, 424 U.S. at 339.

it would not have so badly infected the whole adjudicatory process if it had been openly expressed. But, as the district court found, it was concealed in three separate ways.

First, despite the fact that it was controlling agency policy, the rule that the sequential evaluation process must stop at step three was never made public through the myriad instructions, rulings, claims manuals and other sorts of public information (including representations to Congress and the courts) to which claimants and their counsel have access. Second, petitioners concealed it by requiring adjudicators to falsely state in the record that the claimant had the capacity to engage in certain sorts of work activity and tasks, when the reviewing physicians themselves did not believe this. Third, the class members were not informed of the true basis of decisions denying benefits. Indeed, the notices SSA provided to claimants were affirmatively misleading. Accordingly, contrary to petitioners' argument, the mere fact that SSA notified claimants of the denial of their benefits does not serve to prevent tolling of the 60 day provision since those notices exacerbated rather than remedied the harm.

It is hard to imagine a clearer case for application of the doctrine of equitable tolling. Claimants like Richard Roe III, *see supra* at 11, who did not appeal, were misled into believing that a fair, professional decision had been made when it had not. Even if an advocate had been present and reviewed the evidence in the file — an additional safeguard recognized in *Eldridge*, 424 U.S. at 337-38, 345-46 — he or she would have been reinforced in the erroneous belief that an honest, independent and professional judgment had been made. That the evaluation was a sham, involving the application of a rule, otherwise undisclosed, which was both binding and unlawful, could not have been known. Aware of the deference due to professional judgments by administrative law judges and the Appeals Council, a lawyer might well rationally advise a client not to appeal at all since the case hinged on a question of professional judgment about residual functional capacity. As aptly put by the court of appeals, "[a]ll of the class members who permitted their administrative or judicial remedies to

expire were entitled to believe that their Government's determination of ineligibility was the considered judgment of an agency faithfully executing the laws of the United States." Pet. at 18a.

The court of appeals correctly concluded, therefore, that where "the Government's secretive conduct prevents plaintiffs from knowing of a violation of rights," *id.* at 18a, the limitations period is tolled. The holding was thus neither "sweeping" nor "haphazard," as petitioners claim, Br. at 46, nor would it apply whenever an interpretation of the Act contained in internal operating instructions later turns out to be wrong. *Id.* Rather, it should be applied only in the unique circumstances presented here, which one hopes will never occur again, where petitioners so pervasively and clandestinely violated their obligations to claimants that equitable tolling is required.

Petitioners contend that although this Court has said that equitable tolling is read into every federal statute of limitations, a different rule should apply where the action is brought against the government. Br. at 45-46. However, in *Honda*, the Court applied equitable tolling principles against the government, and fraudulent concealment has been held to extend the time for filing claims against the government even in cases under the Federal Tort Claims Act[32] and the Tucker Act where the time limitations are generally held to be jurisdictional.[33]

Petitioners also argue that the fact that the Secretary may extend the 60 day limitation supports their position that the courts are without the power to do so as well. Br. at 46. However, in *Eldridge*, this Court held that the agency's

32 *Diminnie v. United States*, 728 F.2d 301 (6th Cir. 1984) *cert. denied*, 105 S. Ct. 146 (1984); *Harrison v. United States*, 708 F.2d 1023, 1028 n.1 (5th Cir. 1983); *Richman v. United States*, 709 F.2d 122 (1st Cir. 1983) (dictum); *Barrett v. United States*, 689 F.2d 324 (2d Cir. 1982), *cert. denied sub nom. Cattell v. Barrett*, 462 U.S. 1131 (1983) ("intentional concealment of material facts").

33 *Hohri v. United States*, No. 84-5460 (D.C. Cir. Jan. 21, 1986) (fraudulent concealment); *Japanese War Notes Claimants' Association of the Philippines v. United States*, 373 F.2d 356 (Ct. Cl. 1967) (same) *cert. denied*, 389 U.S. 971 (1967).

authority to define "final decision" for purpose of the exhaustion requirement of § 405(g) does not preclude courts, in appropriate circumstances, from determining "what constitutes a final decision" even over the Secretary's objection. 424 U.S. at 330. In a similar vein, it is entirely consistent with the overall purposes of the Act for the courts, applying well established equitable principles, to toll the time requirements for filing.[34] Indeed, a contrary conclusion, as urged by petitioners, would have the result, under the unusual facts of this case, of making petitioners the sole and final judge of their own misconduct.

Petitioners also rely on the fact that there is an administrative mechanism for requesting reopening of claims to argue that it is inappropriate for courts to apply equitable tolling principles to the class members' claims. Br. at 48. However, the Secretary's creation of a reopening procedure, from which no judicial review is permitted, *Califano v. Sanders*, 430 U.S. 99 (1977), is hardly evidence of Congressional intent to deprive courts of their power to apply equitable tolling principles. In any event, petitioners do not state that under the facts of this case they would actually grant reopening to the members of the class. Indeed, under petitioners' characterization of their own prior wrongdoing as involving merely an erroneous administrative interpretation, the remedy of reopening would not be available, since petitioner's regulations provide that "[w]e will not find good cause to reopen your case if the only reason for reopening is a change of legal interpretation or administrative ruling upon which the determination or decision was made." 20 C.F.R. § 404.989(b).

Petitioners' reliance on *Soriano v. United States*, 352 U.S. 270 (1957) is similarly misplaced. Neither the holding nor the reasoning of *Soriano* deprives courts of their power to apply an

34 Indeed, if this Court were to accept petitioners' argument that the 60 day requirement is jurisdictional and that the agency has exclusive authority to extend it, a substantial separation of powers problem would be raised, since that result would mean that an executive officer was vested with authority to control sovereign immunity, *Finn v. United States*, 123 U.S. 227, 232-33 (1887), and, with it, the jurisdiction of the federal courts, *Crowell v. Benson*, 285 U.S. 22, 54-65 (1932).

appropriate equitable tolling principle against the government if consistent with the purposes of the statute involved. Nothing in the statute under review in *Soriano* suggested that Congress intended the tolling doctrine based on a state of hostilities to apply. Indeed, the Court noted that Congress had enacted specific legislation each time it saw fit to toll statutes of limitations because of war. *Id.* However, the doctrine of equitable tolling is presumed to apply to every federal statute of limitations, and there is no reason to suppose that in passing the Act Congress intended to create an exception and allow the government to bar claims by its own misconduct. Moreover, in *Soriano*, the Court was concerned that tolling based on hostilities would result in tolling, during the entire period of World War II, of every statute of limitations passed by Congress, including not only actions for just compensation, but also suits for tax refunds, tort actions, alien property litigation, and all other claims against the government. *Id.* at 275. By contrast, the application of equitable tolling principles here would toll the statute of limitations only with respect to a specific and limited group of claims that had not been asserted because of the misconduct of the government.

In sum, sovereign immunity does not here bar application of equitable tolling principles against the government, but only requires a careful examination of congressional intent, to determine which, if any, tolling principles apply. As demonstrated above, that examination reveals that the language, structure and purpose of the Act establish that the waiver of sovereign immunity contained in § 405(g) is consistent with, and may be read to include, the principle of equitable tolling based on SSA's misconduct.

B. Even if the Time Limitation Provision is Jurisdictional, It was Never Triggered due to the SSA's Failure to Give Adequate Notice.

The court of appeals observed that "[e]ven if we were inclined to agree with the Secretary that the 60 day provision is jurisdictional, it would still be arguable that the time period was tolled by the non-disclosure of the presumption challenged in this litigation." Pet. at 18a-19a n.6. Although the court did

not need to reach that issue, that point is not merely arguable, but correct: because the notices of adverse determinations sent to all class members were statutorily and constitutionally deficient, they did not trigger the time limitations for judicial review.

Where a limitations period requires notice as a condition, the failure to comply prevents the time from beginning to run.[35] Section 405(g) defines the event triggering the 60 day period as the "mailing" of a "notice" to the claimant. The Act also specifies the content necessary to meet the notice requirement. Section 405(b)(1) and 42 U.S.C. § 1383(c)(1) provide that any adverse decision by the Secretary on disability must include a "statement of the case," a "discussion of the evidence," and the "reasons upon which it is based." The legislative history makes it clear that the purpose of the notice was not only to foster better decisions, but to make claimants' decisions concerning appeal more rational.[36] It is incontrovertable that the notices of adverse decisions sent to the class members failed to comply with this requirement since, far from stating reasons for the decision, SSA provided reasons

35 *Williams v. Hidalgo*, 663 F.2d 183 (D.C. Cir. 1980); *Recreational Vehicle Industry Association v. EPA*, 653 F.2d 562, 569 (D.C. Cir. 1980); *Allen v. United States*, 542 F.2d 176 (3d Cir. 1976); *see Rayburn Dam Electric Cooperative v. F.P.C.*, 515 F.2d 998, 1007 (D.C. Cir. 1975), *cert. denied sub nom. Gulf States Utilities Co. v. F.P.C.*, 426 U.S. 907 (1976).

36 The Senate bill, on which the provision is based, explained that "The State agency decision will be on a sounder base because the examiner will be required to formulate the reasons for his decision in written form *and the claimant may be less likely to appeal the decision if he understands how the law relates to his particular case*. S. Rep. No. 408, 96th Cong., 2d Sess. 56-57, *reprinted in* 1980 U.S. Code Cong. & Ad. News, 1227, 1334-35 (emphasis added). Were petitioners to prevail, the opposite would occur: disability claimants would be compelled to file protective administrative appeals and actions in court, since failure to appeal would bar subsequent judicial relief, even as to unlawful policies which were concealed by SSA at the time the decision to appeal had to be made.

The 1980 amendment did not affect all class members, because it only became effective in mid-1981. Even before the effective date of the amendment, however, SSA's regulations required a statement of reasons. 20 C.F.R. §§ 404.904, 404.953(a); 416.1404, 416.1453(a) (1980). *See Eldridge*, 424 U.S. at 345-46.

that were false, stating that a determination had been made that the claimant had sufficient residual functional capacity to work when no such determination had been made.

The notices violate the requirements not only of the Act but also of due process. One of the most fundamental principles of due process is the right to "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (citations omitted); *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 13 (1978). *See also Lambert v. California*, 355 U.S. 225, 228 (1957); *Joint Antifascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-172 (1951) (Frankfurter J. concurring); *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970). *See* Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1280 (1975) (Due process requires that "notice . . . clearly inform the individual of the proposal action and the grounds for it."). Notices which are confusing or misleading cannot, consistent with due process, be held to provide a basis for the loss of important rights.[37]

Moreover, what is constitutionally adequate may vary with the capacity of the individuals to whom the notice is directed, including, in particular, the diminished capacity of some persons afflicted with mental illness to respond to the notice. *Covey v. Town of Somers*, 351 U.S. 141, 146-7 (1956). *See Memphis Light, Gas & Water Division v. Craft*, 436 U.S. at 14 n.15 (1978)(due process must be evaluated under circumstances where "notice is given to thousands of customers of various levels of education, experience, and resources."). Thus, two courts of appeals have held that a claimant with a mental

37 *Gray Panthers v. Schweiker*, 652 F.2d 146, 172 (D.C. Cir. 1981); 716 F.2d 23, 32-34 (D.C. Cir. 1983); *Dilda v. Quern*, 612 F.2d 1055 (7th Cir. 1980), *cert. denied*, 447 U.S. 935 (1980); *Barger v. Brannon*, 508 F.2d 485 (7th Cir. 1974), *cert. denied*, 420 U.S. 988 (1975); *David v. Heckler*, 591 F. Supp. 1033 (E.D.N.Y. 1984); *Mayhew v. Cohen*, 604 F. Supp. 850 (E.D. Pa. 1984); *Jones v. Blanton*, 536 F. Supp. 1181, 1197-99 (N.D. Ind. 1982); *Sullivant v. Harris*, 497 F. Supp. 492, 493 (D. Kan. 1980).

impairment who received a notice of right to appeal would not be held to have abandoned his claim by his failure to appeal, where he did not understand that notice. *See Parker v. Califano*, 644 F.2d. 1199 (6th Cir. 1981); *Shrader v. Harris*, 631 F.2d. 297 (4th Cir. 1980).

The Court need not reach the issue concerning the capacities of claimants decided in those cases. It need only hold that the denial notices, by failing to inform claimants of the bases for the denial of benefits and by affirmatively misstating that individualized assessments of RFC had been carried out, met neither constitutional nor statutory standards, and so never triggered the running of the time limitations whose passage petitioners now contend bars the class members' claims.

III. IF THE DISTRICT COURT COULD NOT EXERCISE JURISDICTION UNDER § 405(g), IT COULD PROPERLY GRANT RELIEF PURSUANT TO THE MANDAMUS STATUTE.

The court of appeals held that if the district court could not exercise jurisdiction over all class members under § 405(g) because of the time limitation, it could properly grant relief to all class members pursuant to 28 U.S.C. § 1361, the mandamus statute.

The prerequisites for relief under § 1361 are well-established: plaintiff must show (1) a right to have an act performed; (2) that defendant had a clear non-discretionary duty to perform the act requested; and (3) that there is no adequate legal remedy. *E.g.*, *White v. Mathews*, 434 F. Supp. 1252, 1258 (D. Conn. 1976), *aff'd*, 559 F.2d 852 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); 1 *Moore's Federal Practice* ¶ 0.62 [17] at 700.51 (1985). The third element has been interpreted as requiring exhaustion of administrative remedies, but only where those provide an adequate remedy. *See, e.g.*, *Ringer*, 104 S. Ct. at 2023.

As the court of appeals held, if the right to judicial review set out in § 405(g) does not exist, review under § 1361 would be

proper here. The traditional prerequisites for relief under § 1361 are plainly satisfied. Class members have established both a right to have eligibility determinations based on individualized assessments of RFC and petitioners' duty to make such assessments and base eligibility determinations upon them. This duty is clearly non-discretionary. The district court stated that:

> While the individual asssessment requires the exercise of judgment and discretion, the Secretary has no discretion to refuse to perform [a residual functional capacity assessment] or to perform it in such a way as to be meaningless. Pet. at 47a.[38]

Respondents presented "overwhelming" evidence that petitioners, pursuant to a "fixed clandestine policy," failed to perform that duty. Pet. at 39a, 47a.

Furthermore, if § 405(g) is construed as petitioners contend, respondents have no adequate legal remedy. In the ordinary claim for benefits, § 405(g) will be an adequate remedy and relief under § 1361 will not be granted. *E.g.*, *Ringer*, 104 S. Ct. at 2028. However, lower courts have recognized that in unusual circumstances an apparent alternate avenue for review may be inadequate. *Mental Health Association of Minnesota v. Heckler*, 720 F.2d 965, 970-71 (8th Cir. 1983); *Kuehner v. Schweiker*, 717 F.2d 813, 819 (3d Cir. 1983), *vacated on other grounds*, 105 S. Ct. 376 (1984); *Ellis v. Blum*, 643 F.2d 68, 81-82 (2d Cir. 1981); *Vishnevsky v. United States*, 581 F.2d 1249, 1254-55 (7th Cir. 1978); *Burnett v. Tolson*, 474 F.2d 877, 882-83 (4th Cir. 1978); *White v. Mathews*, 434 F. Supp. at 1259 n.35.

Section 405(h) does not preclude review pursuant to § 1361. Section 405(h) now reads:

> No action against the United States, the Secretary, or any officer or employee thereof shall be brought under Section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.

38 Petitioners argue that the issue here was the "discretionary decision" by the Secretary in the cases of class members as to "whether a particular individual has the RFC to do unskilled work . . . ." Br. at 50. This is a misstatement of the issue in this case.

§ 405(h) does not even refer to § 1361; under familiar principles of statutory construction, this statute should be interpreted as not precluding § 1361 jurisdiction.[39]

The court of appeals here determined that the class had demonstrated the Secretary's duty to perform an RFC determination; that exhaustion of administrative remedies was excused; that if § 405(g) were construed to require that suit be brought within 60 days then § 405(g) did not provide an "adequate" remedy; and that § 1361 review was sought within a reasonable time. Pet. at 18a, 20a. These determinations are clearly proper and support the granting of relief to all class members in the exercise of the court's power under § 1361.

IV. IF § 405(g) IS CONSTRUED TO BAR RELIEF TO MENTALLY ILL CLAIMANTS WHO WERE INJURED BY ILLEGAL ACTS WHICH WERE NOT DISCLOSED TO THEM UNTIL AFTER THEIR ABILITY TO COMPLY WITH THE CONDITIONS FOR REVIEW HAD LAPSED, IT UNCONSTITUTIONALLY DEPRIVES CLAIMANTS OF ACCESS TO THE JUDICIAL FORUM.

The essence of petitioners' position is that § 405(g) places limitations on the power of an Article III court to provide relief to individuals who were injured by a policy which petitioners concede was unlawful, but which they did not

39 Petitioners contend that, notwithstanding its language, § 405(h) excludes § 1361 review. Br. at 50 n.15. Petitioners thus ignore the "unfractured consensus in the Courts of Appeals," that § 405(h) never excluded mandamus review. *Ganem v. Heckler*, 746 F.2d 844, 850 (D.C. Cir. 1984); *Ellis v. Blum*, 643 F.2d at 78-82 (2d Cir. 1981); *see also Lindahl v. Office of Personnel Management*, 105 S. Ct. 1620, 1627 n.13 (1985) (noting other statutes that explicitly exclude mandamus review). Further, the technical correction to which petitioners advert is just what it purports to be—a clarification that the only sources of jurisdiction precluded are 28 U.S.C § 1331 and 28 U.S.C. § 1346.

disclose to the injured individuals until after the ability to comply with certain conditions for review had lapsed. If petitioners are correct, § 405(g), as thus construed, unconstitutionally limits the ability of the respondent class members to enforce their statutory and constitutional rights.

Congress, in enacting § 405(g), intended that claimants have the right to have the agency's alleged errors of law ultimately reviewed by an Article III court. In granting a statutory right of access to a judicial forum, Congress created a valuable property right, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-431 (1982), which the government cannot, consistent with the requirements of due process, frustrate or impede by the imposition of unreasonable conditions or limitations. Thus, statutory limitations on access to a judicial forum are unconstitutional where (a) they are construed so that the government's conduct effectively destroys that right of access, *id.* at 430 & n.5; (b) notice of the potential claim is withheld from the affected individuals until it is too late to seek judicial redress, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-18 (1950); or (c) the statutory entitlement to the adjudicatory forum is burdened with unreasonably short time constraints that are virtually certain to exclude large numbers of the group from access to the forum, *Pickett v. Brown*, 462 U.S. 1, 11-18 (1983); *Mills v. Habluetzel*, 450 U.S. 91, 97-101 (1982). *See also Boddie v. Connecticut*, 401 U.S. 371 (1971).

Petitioners' wooden construction of § 405(g) would burden the exercise of the right of access to a judicial forum granted by Congress in precisely the ways which this Court has ruled would violate due process. Petitioners' affirmative misconduct in concealing the Secretary's unlawful policy—which is far more egregious than the unintended actions of the state agency in *Logan*—frustrated the statutory entitlement of the respondent class members to a judicial forum. Similarly, as in *Mullane*, petitioners did not provide claimants with notice of their potential claim—the challenge to the illegal policy—until after the time limitations for administrative appeals and judicial

review had lapsed. Finally, as in *Mills* and *Pickett*, if the time limitations in § 405(g) are construed to expire even before the claimant has notice of the actual basis of the adverse determination of his or her claim, the limitation would constitute an unreasonably short and thus unconstitutional time constraint. If, in *Pickett*, it violated due process to expect an unwed new mother to have the capacity to seek to establish the paternity of her child within two years of its birth, it is surely unconstitutional to impose an even shorter period upon mentally ill disability claimants who are never notified of the existence of a claim until it is already too late to pursue it.

Even if § 405(g) is viewed, as the petitioners urge, not merely as the establishment of the right of review, but as a waiver of sovereign immunity, that waiver must be similarly subject to constitutional restraints. Congress could not waive sovereign immunity and then impose conditions on the waiver which violate due process.

Courts, of course, should seek to construe statutes to avoid constitutional questions. *Salfi*, 422 U.S. at 76 (discussing *Johnson v. Robison*, 415 U.S. 361 (1974)); *Ashwander v. T.V.A.*, 297 U.S. 288, 341, 346-48 (1936) (Brandeis, J., concurring). Such a result can be avoided if § 405(g) is construed to allow, under the extraordinary circumstances present here, a waiver of further exhaustion and tolling of the time limitations.

CONCLUSION

For all of the above stated reasons, the decision of the court of appeals should be affirmed in all respects.

January 28, 1986

Respectfully submitted,

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APPENDIX

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 205(b)(1) of the Social Security Act, 42 U.S.C. § 405(b)(1), provides:

> **Administrative determination of entitlement to benefits; findings of fact; hearings; investigations; evidentiary hearings in reconsiderations of disability benefit terminations.**
>
> The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this sub-chapter. *Any such decision by the Secretary which involves a determination of disability and which is whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based.* Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, surviving divorced father, husband, divorced husband, widower, surviving divorced husband, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision. Any such request with respect to such a decision must be filed within sixty days after notice of such decision is received by the individual making such request. The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary

or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure. (emphasis added)

2. 20 C.F.R. § 404.904 provides:

Notice of the initial determination.

We shall mail a written notice of the initial determination to you at your last known address. The reasons for the initial determination and the effect of the initial determination will be stated in the notice. The notice also informs you of the right to a reconsideration or to a hearing. We will not mail a notice if the beneficiary's entitlement to benefits has ended because of his or her death.

3. 20 C.F.R. § 404.921 provides:

Notice of a reconsidered determination.

We shall mail a written notice of the reconsidered determination to the parties at their last known address. We shall state the specific reasons for the determination and tell you and any other parties of the right to a hearing. If it is appropriate, we will also tell you and any other parties how to use the expedited appeals process.

4. 20 C.F.R. § 404.953(a) provides:

The administrative law judge's decision.

(a) *General.* The administrative law judge shall issue a written decision that gives the findings of fact and the reasons for the decision. The decision must be based on

evidence offered at the hearing or otherwise included in the record. The administrative law judge shall mail a copy of the decision to all the parties at their last known address. The Appeals Council may also receive a copy of the decision.

5. 20 C.F.R. § 416.1404 provides:

Notice of the initial determination.

(a) We shall mail a written notice of the initial determination to you at your last known address. Generally, we will not send a notice if your benefits are stopped because of your death, or if the initial determination is a redetermination that your eligibility for benefits and the amount of your benefits have not changed.

(b) The written notice that we send will tell you—

(1) What our initial determination is;

(2) The reasons for our determination; and

(3) What rights you have to a reconsideration or hearing on the determination.

(c) If our initial determination is that we must suspend, reduce or terminate benefits, the notice will also tell you that you have a right to a reconsideration or hearing before the determination takes effect (See § 416.1336).

6. 20 C.F.R. § 416.1421 provides:

Notice of a reconsidered determination.

We shall mail a written notice of the reconsidered determination to the parties at their last known address. We shall state the specific reasons for the determination and tell you and any other parties of the right to a hearing. If it is appropriate, we will also tell you and any other parties how to use the expedited appeals process.

7. 20 C.F.R. § 416.1453 provides:

The administrative law judge's decision.

(a) *General.* The administrative law judge shall issue a written decision which gives the findings of fact and the reasons for the decision. The decision must be based on evidence offered at the hearing or otherwise included in the record. The administrative law judge shall mail a copy of the decision to all the parties at their last known address. The Appeals Council may also receive a copy of the decision.

JOINT APPENDIX

No. 84-1923

JAN 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED JUNE 7, 1985
CERTIORARI GRANTED OCTOBER 7, 1985

Volume 1

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JOINT APPENDIX

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IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

CV 83 0457

CITY OF NEW YORK, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, STATE OF NEW YORK, CESAR PERALES, COMMISSIONER, N.Y.S. DEPT. OF SOCIAL SERVICES, WILLIAM F. MORRIS, ACTING COMMISSIONER, N.Y.S. OFFICE OF MENTAL HEALTH, JANE DOES I AND II, RICHARD DOES I, II, III & IV

v.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES AND JOHN A. SVAHN, COMMISSIONER OF U.S. SOCIAL SECURITY ADMINISTRATION

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
2/8/83	1	Complaint filed, summons issued.
2/18/83	5	BY WEINSTEIN, J.—Order dtd 2/15/83 that this civil case is referred to the U.S. Magistrates (CADEN) to hold conferences with counsel for the parties etc. Filed. C.M. See order for details.
2/18/83	6	Notice of Motion for expedited discovery ret 2/22/83 @11a.m., filed.
2/18/83		BY WEINSTEIN, J.—Order dtd 2/16/83 on doc #6 that the motion is referred to the Magistrate. Doc #6 forwarded to Mag Caden.
2/22/83	8	Revised Notice of Motion for expedited discovery, filed. (ret 2/22/83 @11a.m.)
2/25/83	10	Summons ret. filed. executed.

3/11/83	13	Notice of Motion ret 3/22/83 @11a.m. for an order determining that the action may be maintained as a class action. Affidavit attached.
3/11/83	14	Memorandum for Individual pltffs in support of Motion for class certification, filed.
3/28/83		Defts' Response to Pltffs' First Request for the Production of Documents, filed.
3/31/83		Response to Pltffs' First Set of Interrogatories, filed.
4/14/83	19	Defts' First Memorandum in Opposition to Motion for class certification filed.
4/26/83	22	Appendices to Pltffs' Reply Memorandum in Support of Motion for Class Certification, filed.
4/26/83	23	Pltffs' Reply Memorandum in Support of Motion for Class Certification, filed.
4/27/83		Before WEINSTEIN, CH. J.—Case called. Counsel listed above, for all sides present. Pltff's motion for an order determining that this action may be maintained as a class action—argued—specifics on the record—GRANTED. Order to be submitted. Counsel to agree on terms of certification.
5/3/83	24	BY WEINSTEIN, J.—Order dtd 5/2/83 certifying case as class action filed.
6/22/83	26	ANSWER, filed.
7/8/83		Before WEINSTEIN, CHJ. Case called All sides listed above pres. Con. held. P/T/O signed. Conformed copies given to parties. Non-Jury Trial set for

		10/31/83 @ 9:30 a.m. Individuals Pltff's Amended Complaint to be filed. City Pltff Motion for hearing on Preliminary Injunction. to be consolidated at trial on Merits-granted.
7/11/83	30	By WEINSTEIN, CHJ. Civil PRE-TRIAL Order dtd 7/8/83 Order appearance of parties witnesses and Exhibits on 10/31/83 @ 9:30 a.m. filed. Copies mailed.— —
8/11/83	32	Stipulation that certain personal identifying information be masked and made unavailable to public filed. see stip for details.
9/8/83	34	Plaintiff Notice of Motion for a preliminary injunction awarding plaintiffs each item of injunctive relief demanded filed.
9/8/83	35	Affidavit and index to exhibits Submitted in Support of plaintiffs motion for a preliminary injunction filed.
9/8/83	36	Plaintiff's Memorandum of law in support of motion for summary judgment or, in the Alternative, for a preliminary injunction filed.— —
9/16/83	37	By Sifton, J. O.T.S.C. dtd 9/16/83 @ 11:00 a.m. returnable 9/20/83 @ 9:30 a.m. why the court should not enter an order to preserve the status of all class members presently receiving SSD or SSI benefits, etc., filed. Service by 9/16/83 by 2:00 p.m. (see order for more details)
9/16/83	38	Pltffs' memo of law in support of their motion for limited preliminary injunction, filed.

9/16/83	39	Affidavits in support of motion for limited preliminary injunction, under seal by order of J. Sifton dtd 9/16/83.
9/20/83		By Weinstein, J. Case called. Counsel for all sides present. Plaintiff's OTSC why an order should not be entered directing defendants to preserve the status of all class members receiving SSD or SSI Benefits, to restore benefits to those having active pending appeals. denied. Intervenor Alberta B.'s motions to intervene denied. Plaintiff to draft order without consent with respect to SEC. reconsidering restoring benefits to those people disable a with mental illness.
9/26/83		Affidavit of John Allocca in Opposition to motion for a temporary restraining Order filed. Declaration of Service attached.
9/29/83		Stenographer's Transcript dtd 9/20/83 @ 9:30 a.m. & filed.
10/4/83	44	UN signed findings of tact and order filed.
10/5/83	45	By Weinstein, J. Order dtd 10/3/83 that pltffs' motion should be granted in part & denied in part & filed. (see order for details)
10/17/83	46	By Weinstein, J. Stip/Order dtd 10/14/83 that pltffs may file an amended complaint dtd 10/11/83 a copy of which has been served on atty for the defts, etc., filed. (see order for more details)
10/17/83	47	Amended complaint, filed.
10/31/83		Before Weinstein, J. Case called. All sides present. Non-jury trial ordered & begun. Trial cont'd 11/1/83 @ 10:15 a.m.

11/1/83	49	Bef. Weinstein, J. Case called. Couns. for all sides pres. Non-Jury trial resumed. Trial Cont'd 11/2/83 @ 11:30 a.m. filed.
11/2/83		Before WEINSTEIN, J.—case called for trial. Counsel for all sides present. Non-jury trial resumed. Trial cont'd 11/3/83 at 11:15 a.m.
11/3/83	50	Bef. Weinstein, J. All sides represented. Case called. Non-jury trial resumed. Pltff's rest. Decision reserved on motion. Trial cont'd 11/4/83 @ 2:30 p.m.
11/4/83		Before Weinstein, J. Case called. Counsel for all sides pres. Non jury trial resumed. Trial cont'd to 11/7/83 @ 9:30 a.m.
11/7/83		Bef. Weinstein, J. Case called. Counsel for all sides pres. Non Jury Trial resumed. Trial Cont'd 11/8/83 @ 10:00 a.m.
11/8/83		Bef. Weinstein, M. Case called. Counsel for all sides pres. Post trial. Briefs to be submitted by 11/30/83 Reply brief 1 week after Oral argument set for 12/21/83 @ 4:00.
11/15/83	52	Ltr dtd 11/10/83 from AUSA Koolyk to J. Weinstein, In Re: defts have decided to defer submission of a memo on the exhaustion etc. & to consolidate the legal arguments with the post trial brief filed.
12/12/83	54	Deft's memo of Law on Jurisdiction, class certification & standing.
12/12/83	55	Appendix to defts' Memo of Law on jurisdiction, class certification & standing.
12/19/83	56	Pltffs' post trial memo of law.

12/19/83	57	Pltffs' reply memo of law.
12/22/83	59	Deft's Trial Brief.
12/21/83		Before JBW. Case called. Counsel present. Argument heard. Decision reserved. Argument in this case deemed made in CV 83-
1/11/84	53a	By Weinstein-Memo & Order dtd 1/11/84 Directing the Secretary to Reinstate Benefits of all class Members, Etc. This Memo & Order constitutes a final Judgment and Judgment is stayed for ten days to Permit Application to C of A. All parties Notifies.
1/23/84	58a	* * * NOTICE OF APPEAL (Defts-appealants fm Order entered 1/11/84. No fees. C of A notified. Parties informed. VW
1/26/84		Before Weinstein-Case called. All sides pres. Govt's OTSC argued order to be submitted amending Court Prior Order. Order to be submitted granting Govt Partial Stay.
1/30/84	63	Affidavit in opposition to appl. for a stay pending appeal.
1/30/84	64	Pltff's Memo of law in opposition to deft's application for a stay pending appeal.
2/1/84	69	By JBW. Order dtd 1/31/84 that the amended Judgment is stay for a period of 10 days to permit application for a further stay to the Ct. of Appeals & that it is stayed pending the decision of the U.S. Ct. of Appeal except that benefits shall be reinstated as of the date of this Order but not otherwise awarded retroactively, etc. (see Order for details)

2/1/84	70	By JBW. Amended Judgment & Order dtd 1/31/84 that the definition of the class is amended, that all decision of the Secretary to deny benefits or to terminate benefits to class members must promptly be reopened & re-determined by the Secretary, etc & the US cts are not bound by the judgment, Some retroactivity may be involved for the period between now & the time the 1st payment is made under this order. (see Order for details)
2/2/84	71	* * * AMENDED NOTICE OF APPEAL (defts-appellants) fm amended judgment & Order entered 2/1/84. Copy mailed to C of A. Parties informed.
2/28/84	78	Cert copy of order fm C of A dtd 2/21/84 denying motion for stay of current d.c order. A limited stay is granted to 2/24/84 to allow appellants to apply to Supreme Court for a stay. The appeal is expedited: record & appellant's brief filed by 3/6/84, appellee's brief by 3/16/84, & argument of appeal heard during week of 3/19/84. C/A #84 6037
3/2/84	79	Memorandum in support of plaintiffs' motion for attorney's fees, etc., filed.
3/2/84	80	Planitiff's Motion for attorneys' fees, etc., filed.
3/7/84	82	Stipulation designating record on appeal.
3/7/84		Record cert & sent to C of A. Ack req.
3/27/84	86	Ack fm c of A for receipt of record. C/A #84 6037

5/4/84	93	By Weinstein, J.—Order dated 5/3/84 to show cause returnable 5/25/84 at 2:00 p.m. why an order finding defts. in contempt of Court, etc., together with affidavit of Thomas W. Bergdall, filed.
5/25/84	96	Before Weinstein, J.—Case Called. Counsels present. Order to show cause heard. Stipulation signed. Second Order signed with respect to class member cases. Order signed and returned to Govt.
5/29/84	97	By Weinstein, J.—Order dated 5/25/84 that with respect to class members who have claims pending in district court, the Secretary shall inform them of decree of court dated 1/31/84, filed.
5/29/84	98	By Weinstein, J.—Stipulation and Order dated 5/25/84 that parties have agreed to implementation of the Court's amended order and judgment of 1/31/84, etc., filed.
7/26/84	101	By JBW. O.T.S.C. dtd 7/25 returnable 8/2 @ 10:15 a.m. why an order should not be entered directing defts to comply with the Ct's amended judgment & order dtd 1/31/84, etc. Service by 7/27 by 5:00 p.m. Affidavit of Thomas W. Bergdall attached.
8/2/84	102	By Weinstein Order dtd 8/2/84. Motion withdrawn as moot with leave to reapply should deft refuse to grant other relief collateral to disability benefits.
8/2/84		Before Weinstein-Case called. Counsel for all sides pres. OTSC (#101) with-

		drawn on consent of govt to grant relief sought on medicare coverage only. Application of Mr. Bergdall to adjourned motion with respect to other relief denied as moot w/leave to renew if after negotiations w/govt it is necessary.
1/8/85		Before Weinstein, J., Case called. Plaintiff's motion for attorney's fees pursuant to Equal Access to Justice Act settled. Settlement papers to be forwarded.
1/14/85	113	By Weinstein, J., Stip & Order of Settlement & Compromise, that plaintiffs Jane Doe I, II and III and Richard Roes I, II, III, IV & V on behalf of themselves and other similarly situated and the defendants, through their respective counsel, that the defts will pay by check to or for the plaintiff and Rosenman Colin Freund Lewis & Cohen the sum of $73,000.00 without interest, and by check to or for the plaintiffs and the Mental Health Law Project the sum of $27,000.00 without interest, amounting in all to $100,000.00 without interest, which sum of money plaintiffs agree to accept in full settlement and discharge of any claim they have for attorney's fees under the Equal Access to Justice Act, 28 USC 2412. Parties informed.
1/28/85	114	By Weinstein, J., Stip & Order dtd 1/28/85, that defts will cease their current efforts to identify class members, as provided by the Stip & Order of

		5/25/84, in order to direct their exclusive efforts to further computer processing in order to identify and locate the case files of all potential class members, whether cessation cases or initial applications. Such computer processing will be completed, and a new listing of potential class members produced, no later than 1/11/85. See Stip & Order for other details.
4/24/85	115	Cert copy of mandate fm C of A dtd 8/27/85 affirming jdgmnt. Ack mailed. (Cert copy of mandate dtd 2/7/85 fm Sec petition for rehearing; petition for rehearing denied, attached). C/A #84 6037
5/2/85	116	Plaintiffs' Notice of Motion ret. 5/8/85 @ 9:30 a.m., for an Order compelling defts to comply with the Amended Judgment & Order dtd 1/31/84, etc.
4/24/85		Record rec'd fm C of A. Ack mailed. C/A #84 6037
5/22/85	118	Deft Heckler's Memorandum Of Law In Opposition To Plaintiffs' Motion To Compel Compliance With Amended Judgment And Order.
5/22/85	119	Exhibits 1-9 to Memo of Law (above).
5/31/85	120	Deft Heckler's Corrected Memorandum Of Law In Opposition To Plaintiffs' Motion To Compel Compliance With Amended Judgment And Order. (entrd 6/3)
6/4/85	122	Plaintiffs' Reply Affidavit of Michael D. Young In Support of Motion to Compel. etc.

6/5/85		Before Weinstein, J – Case called, counsel for all sides present. Plt's motion to Compel argued. Court follows Govt's suggestion w/respect to unscreened cases. Discussion held. Rulings on the record. Gov't to submit order.
7/1/85	123	Letter dated 6/27/85 from Deborah Zwany, AUSA, to Judge Weinstein, regarding a proposed order. No order was attached.
7/1/85	124	By JBW dated 6/27/85, Order filed stating procedures to be used in screening each claim for the denial cases & the cessation cases. Further ordered that pltf.'s mot. to change the parameters of the Sec.' screening process is denied.
*6/27/85	125	Ltr of 6/27/85 fm Deborah B. Zwany, AUSA to J. Weinstein enclosing proposed order w/respect to issues addressed at 6/5/85 argument, filed. (Entd. 7/9/85)
7/17/85	126	Copy of ltr dtd 7/1/85 From Francis J. Lorson to Honorable Charles Fried re: That the application for a partial stay of judgment is granted pending the disposition by this court of the petition for a writ of certiorari.
8/6/85		Before Weinstein, J. Case called in re: The Courts direction to defts. to supply pltffs. with computer tapes to facilitate the identification of class members. Counsel for all parties present except as to Mr. Rubenstein. Application for defts. to supply pltffs. with computer tapes to facilitate the identification-argued. The Court has

no objection to the tapes being turned over to the pltff. so that files can be screened to review cases of severity. Deadline of 1/1/86 for computer list of class members to be produced. Parties to work out an agreement for a date the computer list of class members to be produced. Parties to work out an agreement for a date the computer tapes are to be returned to the deft. Standard of severity to be used to identify class members. Deft.'s not bound by pltff.'s findings. Order to be submitted to the effect that the computer tapes are for the purpose of the City of N.Y. to identify class members. Pltffs.' to send review notice to potential class members only. Review notice to state that potential class members should not appear at their local Social Security Administration office. Filed. (Ent'd 8/7/85).

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 84-6037

CITY OF NEW YORK, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, STATE OF NEW YORK, CESAR PERALES, COMMISSIONER, N.Y.S. DEPT. OF SOCIAL SERVICES, WILLIAM F. MORRIS, ACTING COMMISSIONER, N.Y.S. OFFICE OF MENTAL HEALTH, JANE DOES I AND II, RICHARD DOES I, II, III & IV, PLAINTIFFS-APPELLEES,

v.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES AND JOHN A. SVAHN, COMMISSIONER OF U.S. SOCIAL SECURITY ADMINISTRATION,
DEFENDANTS-APPELLANTS.

RELEVANT DOCKET ENTRIES

DATE	FILINGS–PROCEEDINGS
2/8/84	Copy of district court docket entries and *amended* notice of appeal filed.
2/10/84	Appellant HHS emergency motion for stay pending appeal filed.
2/10/84	Appellant HHS motion for leave to file an oversized memorandum of law filed.
2/10/84	Appellant HHS supplemental memorandum of law in support of motion for stay filed.
2/15/84	Appellant HHS motion for leave to docket appeal two days late filed.
2/16/84	Appellee City of New York memorandum of law in opposition to motion for stay pending appeal filed.
3/12/84	Sufficient Record on Appeal and Supplemental Record on Appeal filed.

3/7/84	Appellants' Brief filed.
3/20/84	Appellees' Brief filed.
3/23/84	Reply Brief filed.
3/23/84	Case argued and submitted.
8/27/84	Opinion Issued.
9/18/84	Appellants Heckler, et al. petition for rehearing and suggestion for rehearing in banc filed.
9/25/84	Supplemental papers in support of petition for rehearing and suggestion for in banc filed.
10/6/84	Appellant HECKLER motion for leave to file supplemental brief in support of appellant's petition for rehearing with suggestion of rehearing en banc filed (copy of Supplemental brief mailed to the panel) (see entry of 11-1)
11/1/84	Order granting Appellant HECKLER, ET AL. motion for leave to file supplemental brief in support of appellant's Petition For Rehearing with suggestion of rehearing en banc filed (per JON) (endorsed on motion dated 10/26/84)
11/21/84	Appellee City of New York memorandum in response to supplemental brief in support of petition for rehearing with suggestion for rehearing in banc w/pfs filed. (panel)
2/7/85	Order denied petition for rehearing and suggestion for rehearing in banc filed.
2/7/85	Published printed opinion, petition for rehearing denied filed (JON).
2/21/85	ORDER GRANTED Appellant HECKLER motion for stay of mandate for 30 days pursuant to FRAP 41(b).
3/29/85	Order denying Appellant HECKLER motion for stay of mandate for additional 30 days pursuant to rule 41(b) FRAP FILED (JEL, JON, GCP)

4/1/85	MANDATE (opinion, judgment) ISSUED
6/24/85	Notice of filing of petition for writ of certiorari filed (SC #84-1923)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Amended Complaint
CV 83-0457

THE CITY OF NEW YORK, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, STATE OF NEW YORK, CESAR PERALES, AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, WILLIAM F. MORRIS, AS ACTING COMMISSIONER OF THE NEW YORK STATE OFFICE OF MENTAL HEALTH, AND JANE DOES I, II, AND III AND RICHARD ROES I, II, III AND IV AND V ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

MARGARET HECKLER, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND JOHN A. SVAHN, AS COMMISSIONER OF THE UNITED STATES SOCIAL SECURITY ADMINISTRATION, DEFENDANTS.

PRELIMINARY STATEMENT

1. By this action plaintiffs seek declaratory and injunctive relief against practices and policies of the Secretary of Health and Human Services which have caused and are causing the denial and termination of Social Security Disability Insurance ("SSD") and Supplemental Security Income ("SSI") benefits to thousands of mentally disabled persons in New York in violation of the United States Constitution, the Social Security Act and the Secretary's regulations. The application of these practices and policies has resulted in the routine denial of disability benefits to certain otherwise eligible severely mentally disabled individuals solely because they are improperly found to be

employable. The standards by which these determinations have been made are unfounded in fact, arbitrary, capricious and directly contrary to the Secretary's statutory obligation to perform a realistic, individual assessment of ability to engage in substantial gainful activity based upon all relevant medical and vocational factors.

2. The challenged standards, practices and policies constitute effective rules of prospective application which have never been formally adopted and published, with notice and public comment, as required by the Administrative Procedure Act, 5 U.S.C. § 551 et seq., and the Federal Register Act, 44 U.S.C. § 1505.

3. The consequences of defendants' policies and practices are that:

(a) thousands of eligible mentally disabled persons who are unable to work have been wrongfully denied or terminated from essential benefits to their significant economic, psychological and physical harm;

(b) state and city hospitals, state and city shelters, and state and city public assistance programs, are overburdened and their resources taxed by the increased administrative, fiscal and service responsibilities;

(c) state and city welfare agencies are forced to cover the loss of federal monies and thereby incur substantially increased costs in their Home Relief, Medicaid and AFDC programs; and

(d) the number of homeless persons has increased, and these persons are suffering serious economic, psychological and physical harm.

JURISDICTION

4. This action arises under the Social Security Act, 42 U.S.C. §§ 401 et seq., the Administrative Procedure Act, 5 U.S.C. §§ 552 et seq., the Federal Register Act, 44 U.S.C. §§ 1505, the Declaratory Judgment Act, 28 U.S.C. §§ 2201 et seq., and the Fifth Amendment to the United

States Constitution. This Court has jurisdiction under 5 U.S.C. §§ 552(a)(4)(B), 28 U.S.C. § 1331, 28 U.S.C. § 1361, and under 42 U.S.C. § 405(g) and 1383(c)(3). Venue in this District is proper under 28 U.S.C. § 1391(e) and 42 U.S.C. § 405(g).

PARTIES

5. Defendant Margaret Heckler, Secretary of the United States Department of Health and Human Services ("the Secretary"), is and has been charged with overall supervision and administration of the Social Security Administration ("SSA"), and has the responsibility to insure that proper standards and procedures are utilized in the determination of initial eligibility and continuing eligibility for disability benefits under both Title II ("SSD") and Title XVI ("SSI") of the Social Security Act. Defendant has ultimate responsibility for disability determinations under both programs. Defendant further has authority under the Social Security Act to issue binding regulations to govern eligibility for disability benefits. Defendant is sued in her official capacity. The term "Secretary" as utilized in this complaint refers both to the Secretary and her predecessors.

6. Defendant John A. Svahn is the Commissioner of the United States Social Security Administration, an agency of the Department of Health and Human Services. In that capacity, he has been delegated authority by the Secretary to administer the SSD and SSI programs. Defendant Svahn is sued in his official capacity.

7. Plaintiff The City of New York ("the City") is a domestic municipal corporation. Pursuant to the New York Social Services Law, the City is required to provide Home Relief and shelter to all persons within its borders who are in need of assistance, many of whom require such assistance by virtue of the wrongful denial or termination of SSD and SSI benefits. Pursuant to section 394(c) of the New York City Charter, this action is commenced both on behalf of the City and of the people of the City of New York.

8. Plaintiff New York City Health and Hospitals Corporation ("HHC") is a domestic corporation which maintains facilities for the treatment of mentally ill persons within the City of New York, many of whom require hospitalization by virtue of the wrongful denial or termination of SSD or SSI benefits.

9. Plaintiff The State of New York is the sovereign State suing on behalf of the People of the State.

10. Plaintiff Cesar Perales is Commissioner of the New York State Department of Social Services ("DSS"). He is the chief administrative officer of the Department and is responsible for enforcing the State's laws and regulations with respect to the care of the needy. DSS administers the State's Home Relief, AFDC and Medicaid programs with the cooperation of local counties. DSS, by agreement with and at the direction of the defendants, performs the initial determination of eligibility for SSD and SSI benefits for the mentally disabled.

11. Plaintiff William F. Morris is Acting Commissioner of the New York State Office of Mental Health ("OMH"). He is its acting chief administrative officer and is charged with enforcing the State's laws and regulations with respect to the care and treatment of persons suffering from mental illness. OMH is responsible for the operation of the State's in-patient and out-patient centers that treat persons in need of mental health services.

12. Plaintiff Jane Doe I is a 31 year old woman who is incapable of engaging in substantial gainful activity as the result of mental illness. She received SSD and SSI benefits based on manic depressive illness commencing in 1980 until they were terminated in August 1982 following a review. She is a college graduate who worked as a librarian from August 1974 to April 1980. Beginning in 1978, and in each of the following three years, she had multiple psychiatric hospital admissions, including one in 1980 for 3 1/2 months following a suicide attempt. She has been

with a residential support organization for the mentally ill in Queens County since 1980. Since July 1982 she has received care in a restrictive dormitory style living arrangement with 24 hour a day supervision. She attends weekly psychotherapy sessions and is taking medication. Her thoughts are disordered and the slightest stress causes intense anxiety and psychotic disturbances in mood and thinking. Despite evidence of recent deterioration in her condition, defendants terminated her benefits on the ground that her impairment no longer met or equaled the Listing of Impairments appended to the Regulations. That decision was affirmed by an Administrative Law Judge and by the Social Security Appeals Council. Her individual claim for benefits is pending in this Court.

13. Plaintiff Jane Doe II is a 36 year old woman who suffers from schizophrenia and lacks capacity for substantial gainful activity. She has been residing at a rehabilitation center in Brooklyn since April 1982, shortly after she had been hospitalized because she had been living on the streets and had a recent history of psychotic behavior. She is a high school graduate and has had a number of jobs, but lost them because of psychotic breakdowns. Her last employment, which was terminated in 1981, was with the Police Department as a clerical aide under a publicly assisted program. Her judgment is poor and her reliability questionable. Her appearance and behavior are bizarre. She has difficulty in relating to others. On her applications for SSD and SSI disability benefits, it was determined, initially and on reconsideration, that while her condition prevents her from returning to her "usual job," there are "many other jobs" that she can do. Since the commencement of this action, her claim for benefits has been allowed by a Administrative Law Judge on the ground that she meets the Listing of Impairments appended to the Regulations.

14. Jane Doe III is a thirty year old single woman who has been diagnosed by the State Department of Social Services as suffering from a schizoaffective disorder with depression. Diagnoses from her psychiatric hospital admissions and here out-patient clinic have described her as suffering from borderline psychotic personality disorder. Her hospital admissions were prompted by her suicidal ideation and child abuse. She also attempted to kill herself two weeks before her hearing before an Administrative Law Judge. She claims that she was commanded by voices. She is 5'1" tall and weighs 311 lbs. Her counselors attribute her excessive weight to eating binges triggered by depression. She is withdrawn, depressed, paranoid, and prone to bouts of crying. She gave her child up for adoption because of her fear of child abuse. She currently resides in a residential support program with 24 hour supervision. The Appeals Council refused to review the Administrative Law Judge's determination of non-severity and she has recently filed an action for review of that decision in this Court.

15. Plaintiff Richard Roe I is a 32 year old male who suffers from chronic schizophrenia and lacks capacity for any substantial gainful activity. He has a high school education. He was employed as a truck driver by United Parcel from 1974 to 1977 and has not worked since 1978. He receives welfare payments. He resides in a psychiatric community residence in Brooklyn where he regularly receives medication and psychotherapy. He has had numerous psychiatric hospitalizations since 1977. His thinking is disorganized and he has paranoid delusions. In June, 1982, on appeal from an adverse decision, an Administrative Law Judge found his disability to be so severe that he met the Listing of Impairments, but he was denied benefits under the nondisability provisions of the Act. On a later application filed in October 1982, however, it was determined initially and on reconsideration, that while he

cannot return to his former work as a truck driver, there are other kinds of work that he can do. He failed to appeal from that determination.

16. Plaintriff Richard Roe II is a 39 year old male who has borderline mental retardation (IQ of 85) and suffers from schizophrenia. He is incapable of sustained employment. He has had several family care placements since 1971, and now lives in a residential support program in Queens County. He is subject to extreme changes in mood, alternating between quiet withdrawal and irritability bordering on physical violence. He is subject to seizures which have been held in remission by medication, but he had a seizure in September 1982 for which he was taken by ambulance to a hospital. His reasoning is erratic and his judgment poor. While he tries to appear neat and clean, he has to be reminded to shave and bathe and will go for days wearing clothes which need to be washed. He has had numerous jobs as a messenger, which he has been unable to retain due to his emotional problems. On his application for SSI benefits, the examiner found that while his condition prevents him from returning to his usual job (*i.e.*, as a messenger), there are supposedly many other jobs that he can do. On his application for reconsideration, that determination was affirmed, with the statement that "there are many jobs requiring little or no training" that he can do. Since the filing of this action, an Administrative Law Judge found that Richard Roe II has a non-severe impairment and the Appeals Council refused review. He has an action seeking review of the denial of benefit pending in this Court.

17. Richard Roe III is a 36 year old college educated man who suffers from paranoid schizophrenia and lacks capacity for substantial gainful activity. He had received SSD and SSI benefits in New Jersey which were terminated in 1980. In October 1981, a Manhattan social agency found him living as a vagrant in Central Park. At

that time he was delusional, filthy, hostile and wholly uncooperative with the efforts of the agency to assist him. After months of effort by the agency, he agreed to accept its assistance and to accept shelter. His application for SSI benefits, filed in April 1982, was rejected initially and on reconsideration despite a medical report stating that he hallucinated, had delusions of people being after him, and spent most of his time wandering the streets. At about the time of the decision on reconsideration, he was referred to a psychiatric rehabilitation program, but he was asked to leave after only three days because he was too severely disturbed. In the denial of reconsideration of his application, however, it was stated that while his condition prevented him from returning to his "usual job," there were "many other jobs" that he could perform. He unsuccessfully attempted to perfect an appeal. On a subsequent application, filed after this action was commenced, it was determined that he is disabled.

18. Richard Roe IV is a 44 year old schizophrenic who has no capacity for gainful activity. His speech rambles and his insight and judgment are poor. He has no permanent domicile and has stayed at a city-run shelter for over a year. He is delusive and believes that he is being persecuted by the CIA and FBI. He carries a suitcase at all times. Even minimal stress causes him to become confused, suspicious and alienated. His application for SSI benefits was denied at the reconsideration level, but since the filing of this action, an Administrative Law Judge reversed that denial on the grounds that Richard Roe IV met the requirements of the Listing of Impairments.

19. Richard Roe V is thirty years old and has had numerous psychiatric hospitalizations because of his chronic severe paranoid schizophrenia. He has made at least one suicide attempt. He was fired from his last job because his violent uncontrolled outbursts made it impossible for him or his coworkers to work. He threatened

one of his coworkers with scissors and others with verbal abuse. Everyday occurrences often trigger memories of past traumatic events and he becomes extremely hostile. Although he is able to reside in a residential support program because his most overtly psychotic symptoms are controlled by medication, his behavior is histrionic, emotionally unstable and immature. The Appeals Council affirmed the decision of a Administrative Law Judge that he was severely impaired but had the residual functional capacity to do his past work. He has recently filed an action for review of that decision in this Court.

CLASS ALLEGATIONS

20. The individual named plaintiffs bring this action on behalf of a class defined as follows:

> All individuals residing in the State of New York who have applied for or received Title II and/or Title XVI benefits on or after April 1, 1980, and who have been found by defendants to have a mental impairment which is severe (i.e., determined under 20 CFR § 404,1520(c) or § 416.930(c) to require evaluation under Appendix 1 of that Regulation), and whose applications for benefits have been or will be denied or whose benefits have been or will be terminated, on the basis of defendants' determination that such persons are capable of substantial gainful activity.

21. All members of the class have severe mental illness. The class includes many persons who suffer from additional impairments, including many who are mildly to moderately mentally retarded.

22. The class is so numerous that joinder of all members is impracticable. Within the past year alone, several thousand persons with severe mental illness have had their disability benefits terminated within the State of New York. Defendants alone have the capability to determine the exact number of persons within the defined class.

23. There are numerous questions of law and fact common to the class as a whole, including, *inter alia,* whether defendants have enforced a new substantive rule in violation of publication requirements, and whether defendants' standards, practices, and policies are arbitrary and capricious, or otherwise violate the Social Security Act and regulations.

24. The individual plaintiffs' claims are typical of the claims of the class. They are members of the class, and share a common grievance with the other members of the class. Those class members who have had their benefits granted or restored through the lengthy process of appealing improper decisions still face the threat of termination under the continuing review programs.

25. The individual plaintiffs are identified herein by pseudonyms because they desire to avoid the stigma and embarrassment, as well as possible harm, which publicity regarding their impairments would cause. A letter containing their names is being filed with this complaint.

26. The individual plaintiffs will fairly and adequately represent the interests of the class. There is no conflict of interest between plaintiffs and the class. Plaintiffs' counsel are experienced in mental illness litigation, in Social Security litigation, in federal litigation and in class action litigation. Counsel will vigorously prosecute the case on behalf of the class.

27. Defendants' conduct has been systematic and has affected the class generally. Defendants have acted and failed to act on grounds generally applicable to the class. Final injunctive and declaratory relief with respect to the class as a whole is appropriate.

STATUTORY FRAMEWORK AND PROCEDURAL BACKGROUND

The Statute

28. The federal Social Security Disability Insurance program provides benefits for persons who have contributed to the program and who suffer from a physical or mental disability, defined by the statute as "inability to engage in substantial gainful activity by reason of any medically determinable mental or physical impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The statute further provides that a mental or physical impairment is considered disabling if it is of "such severity that the applicant is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." 42 U.S.C. § 423(d)(2)(A).

29. In addition to the SSD program, the statute provides for welfare benefits to indigent disabled individuals pursuant to the SSI program. The standards for disability determinations under SSI are identical to those for SSD determinations. 42 U.S.C. § 1382c (a)(3)(A).

30. The determination of whether an individual is under a disability is made by an agency of any State which has notified the Secretary that it wishes to make such determinations, unless the Secretary has found that the State agency has substantially failed to make determinations in accordance with the applicable provisions of the law or rules issued thereunder, or unless the State has notified the Secretary that it does not wish to make such determinations. 42 U.S.C. § 421(a)(1). In New York, by agreement

with the Federal government, disability determinations are initially made by the Office of Disability Determinations ("ODD") of the State Department of Social Services. These determinations must be made in accordance with the pertinent provisions of the statute "and the standards and criteria contained in regulations or other written guidelines of the Secretary . . ." 42 U.S.C. § 421(a)(2). This section further provides that nothing therein "shall be construed to authorize the Secretary to take any action except pursuant to law or to regulations promulgated pursuant to law."

31. The Secretary retains ultimate authority to make a determination of disability and may on his own initiative, review any determination by the State agency. The Secretary is also required, in any fiscal year after fiscal year 1982, to review at least 65% of all determinations that individuals are entitled to benefits; such mandated review must be made before any action is taken to implement the determination. 42 U.S.C. § 421(c). In addition, for purposes of continuing eligibility, every case in which an individual has been determined to be under a disability must be reviewed by the applicable State agency or the Secretary, at least once every 3 years, except where a finding has been made that such disability is permanent. 42 U.S.C. § 421(i).

The Secretary's Regulations

32. The Secretary has adopted Regulations governing determination of initial and continuing eligibility for SSD and SSI disability payments. 20 C.F.R. Part 404, subpart P; 20 C.F.R. Part 416, subpart I. The provisions in the Regulations relating to each are substantially identical.

33. The Regulations provide that an applicant or recipient must show that he has a severe impairment which makes him unable to do his previous work or any other substantial gainful activity which exists in the national economy. § 404.1505, § 416.912 et seq.

34. "Substantial gainful activity" is defined as work that involves doing significant and productive physical or mental duties for pay or profit. § 404.1510; § 416.910.

35. The Regulations set forth a five-step sequential evaluation process to be followed in passing on disability claims:

(a) At the first step, if the individual is found to be working at a substantial gainful activity, it will be determined that he is not disabled, regardless of his medical condition or any other factor. § 404.1520(b); § 416.920(b).

(b) At the second step, it is determined whether the applicant has a severe impairment. If he does not have any impairment which significantly limits his physical or mental ability to do "basic work activities," he will be found not to have a severe impairment and, therefore, not be disabled. § 404.1520(c); § 416.920(c). "Basic work activities" are defined to mean "the abilities and aptitudes necessary to do most jobs." § 404.1521; § 416.921.

(c) At step three, it is determined whether the individual with a severe impairment as determined in step two has an impairment of such severity that he is found to be disabled on medical grounds alone, without considering other factors. This is decided by ascertaining whether his condition is included in a Listing of Impairments appended to the Regulations (described in paragraph 34 below) or is equal to one of the listed conditions. If he "meets or equals" the Listing, he is entitled to benefits. § 404.1520(d); § 416.920(d). An individual may still be eligible for benefits, however, even if his condition does not meet or equal the Listings.

(d) If benefits are not denied due to current work activity or the absence of a severe impairment and are not granted on medical facts alone, the fourth step requires a determination (i) of the individual's "residual functional capacity" ("RFC;" see paragraph 35 below) and (ii)

whether it enables him to meet the demands of the work he did in the past. If still capable of performing that kind of work, the individual will be found not to be disabled. § 404.1520(e); § 416.920(e).

(e) If the individual with a severe impairment cannot do his past work, the fifth step calls for a determination as to whether he can engage in any substantial gainful activity. This requires assessment of five factors: the individual's RFC, age, education, and work experience, and the demands of other jobs in the national economy. A finding of entitlement to benefits is made only if he is found to be unable to do other work which exists in significant numbers in the economy. § 404.1520(f); § 416.920(f).

36. The Listing of Impairments considered in the third step of the sequential evaluation process is a list of conditions, signs and symptoms which are deemed to be so severe that their presence alone, without further evidence of inability to work, justifies a finding that the individual is entitled to benefits. § 404.1525(a); § 416.925(a). In the case of mental disorders, those conditions are listed in the categories of chronic brain syndrome, functional psychotic disorders, functional nonpsychotic disorders, and mental retardation. 20 CFR Part 404, subpart P, Appendix I, § 12.00 et seq. While there may be a determination of disability where the individual's condition "equals", but does not "meet" the Listings, such a finding is rarely made in the case of mental disorders.

37. The evaluation of RFC made in the fourth step of the process is a medical assessment, but it is not limited to formal medical findings. The RFC assessment cannot be limited to a re-review of the factors specified in the Listings. The assessment of RFC is a substantially broader evaluation requiring a practical examination of what work, if any, the individual can do despite the limitations resulting from his impairment, and should encompass all pertinent evidence of assistance in determining the extent

to which the impairment will prevent the claimant from functioning in the world of work. § 404.1545; § 416.945. Where the disability is based on a mental impairment, the evaluation of RFC must include consideration of "ability to understand, to carry out and remember instructions, and to respond appropriately to supervision, co-workers and work pressures in a work setting". § 404.1545(c); § 416.945(c). For individuals whose impairments do not meet or equal the severity level of the Listings, the assessment of RFC is often the most important aspect of the sequential evaluation process.

DEFENDANTS' PRACTICES AND DIRECTIVES

38. Upon information and belief, defendants have effectively established new practices, policies and standards to limit eligibility for disability benefits arising from mental impairment in violation of the statute and Regulations. The result of these directives is that certain persons whose mental impairments do not meet or equal the Listings of Impairments are now denied disability benefits on the ground that they retain sufficient residual functional capacity to do at least unskilled work. Under the new policy, an adequate, individualized, and realistic evaluation of capacity to engage in substantial gainful activity is not performed on the basis of relevant evidence at any stage of the sequential evaluation process.

39. A representative statement of defendants' policy appears in a Regional SSA Program Circular issued by the SSA New York office (No. 8-80). After describing the mental components of ability to do unskilled work, that circular stated:

> Where a mental impairment does not meet/equal a 12.00 listing, it will generally follow that the individual has the capacity for at least unskilled work as described above.

The Circular goes on to state that it is a "rare instance" for an eligible claimant not to meet or equal the Listings of Impairments and adds that:

> It should be noted, however, that in most psychiatric cases that do not meet/equal the listings, there are no gross limitations in the ability to hear, speak, or reason. Further, a mental impairment which restricts close contact with others would restrict a claimant from doing work where contact with others is a *critical* factor. Most unskilled work, however, involves working with things rather than people. Thus the capacity for unskilled work represents a broad work capacity for any claimant.

A copy of Program Circular 8-80 is attached to this complaint as Exhibit "A".

40. Current instructions to the State pursuant to this federal policy are summarized in an Evaluation and Training Report dated November 4, 1982, which refers to the foregoing Circular, stating:

> Psychiatric allowances in impairments which do not meet or equal the Listings are possible, although they are rare, as stated in Regional Program Circular 8-80.

A Copy of that report is attached to this complaint as Exhibit "B," attached.

41. The improper weight and presumptive effect which is given to the fact that an applicant does not "meet or equal" the Listings of Impairments is further reflected in the instructions to examining physicians and psychologists regarding use of the "Psychiatric Review Form" (SSA Form 2506) promulgated by defendant to record the medical and psychiatric evaluation of mental disability cases. (SSA Program Operations Manual System ("POMS") section 2211). The Psychiatric Review Form is designed to assign a numerical rating to each of 17 component items in three major areas in order to formulate a

total "Psychiatric Impairment Rating." That rating is on a five-point scale, "one" being normal and "five" a condition which compels a finding that the Listings are met. The intermediate numbers denote increasing degrees of severity. The Psychiatric Review Form, and the 17 factors listed on that form, were not intended to measure RFC, nor do they permit an accurate assessment of whether one has the residual functional capacity to work.

42. In violation of the Regulations described in paragraphs 35 through 38, *supra*, defendants have instructed their agents to utilize the Psychiatric Review Form in order to make determinations as to whether or not the applicant possesses Residual Functional Capacity to gainfully perform unskilled work. For example, in response to an inquiry from the Acting Regional Commissioner of the Social Security Administration, defendants' Chief Consultant in Psychiatry directed that:

> In the Mental Disorders, at least, a Total Psychiatric Impairment rating of less than '5' signifies the ability to engage in [substantial gainful activity] at the level of unskilled work or higher. Where it does not mean that, the PRF is being improperly used. Thus, where the PRF is properly employed, a separate RFC rating would be redundant and tantamount to giving double weight to the same case aspects.

A copy of that memorandum is attached to this complaint as Exhibit "C".

43. Defendants' improper presumption that a failure to meet or equal the Listings is tantamount to a finding of ability to work is further evidenced by the defendants' unwarranted interpretation of the term "unskilled work activity". As applied, that term ignores numerous relevant factors which can and must be assessed to determine whether a mentally disabled individual retains any actual capacity to engage in substantial gainful activity within the meaning of the statute.

44. SSA has no medical, vocational or other empirical or scientific basis for presuming that a mentally impaired person whose condition does not meet or equal the Listings retains the residual functional capacity to perform substantial gainful activity. SSA has conducted no studies of its own, nor does the research of others support its presumption. No scientific basis exists for presuming that the items on the psychiatric Review Form assess ability to work. The considerable medical and scientific evidence on these issues is to the contrary.

45. The improper policies and standards adopted by defendants are embodied in POMS, the Psychiatric Review Form, Program Circulars, training instructions and other internal memoranda and correspondence. In addition, defendants use and have the power to direct State agencies to reexamine cases and their power to monitor the performance of the State agencies through a quality control system to further their improper policies and practices. The actual and intended effect of such directives and reviews has been to create improper and illegal pressures to deny initial or continued benefits with no fair assessment of the indivdual's residual functional capacity to engage in gainful employment.

46. In early 1980, defendants-instituted a process of systematic review of the cases of disability beneficiaries. In that process, known as Continuing Disability Investigation (CDI), the national office of the SSA sends beneficiaries' files to the State agencies for updating of medical evidence and for re-evaluation and determination of disability. In March 1981, two programs were initiated which greatly increased the volume of CDI reviews which were conducted: "Accelerated CDI" or "ACDI" program involving SSD benefits recipients, and the "Profile CDI" or "PCDI" program involving SSI disability benefits recipients. These reviews further targeted a high proportion of "high risk" cases, including cases based upon mental disability, for

early review in priority to other types of claims. Upon information and belief, it is anticipated that in 1983 the total number of CDI reviews conducted pursuant to these programs will increase more than ten-fold over the number of similar reviews which were performed annually from 1976 to 1979, from 7,300 to approximately 75,000 annual CDI reviews.

47. The effects of defendants' illegal standards and policies—particularly when magnified by the effects of the ACDI and PRCDI programs—have been catastrophic. Since the CDI program was accelerated in 1981, approximately one-half of all mentally disabled persons who have undergone CDI's have been at least initially terminated from benefits. Approximately 90% of those persons who have applied for benefits for the first time as the result of mental disability have similarly been denied. On information and belief, the percentage of such terminations and denials is vastly higher than in previous years, despite the fact that there has been no published valid change in the standards for determining whether or not an actual disability is present or continues to exist. The erroneous nature of defendants' determinations is further illustrated by the fact that of those CDI terminations which are administratively appealed over 61% have been reversed by administrative law judges employed by HHS. Upon information and belief, the percentage of reversals involving exclusively mental disability is significantly higher than this overall reversal rate.

48. Since the implementation of defendants' standards, policies, and practices, Home Relief, Aid to Families With Dependent Children and Medicaid caseloads in New York State and City have risen dramatically as persons losing federal monies turn to the State and City for assistance. State and City hospitals have experienced an increase in the number and length of hospitalizations among the mentally ill as a result of the denial or termination of SSD and SSI benefits. There has also been an increase in the City Shelter population attributable to defendants' actions.

49. Defendants' policies and practices have caused and continue to cause untold hardship and distress to the individual plaintiffs and the members of the class whom they represent. Effective protection from such harm is not afforded by the available administrative appeal procedures.

FIRST CLAIM FOR RELIEF

Violations of the Fifth Amendment, Social Security Act and the Secretary's Regulations

50. It is the policy and practice of defendants to determine that persons whose mental impairment does not meet or equal the Listings of Impairments set forth in the SSA Regulations retain sufficient residual functional capacity to do unskilled work, and thus to deny SSD and SSI disability benefits to such individuals on the ground that they can engage in substantial gainful activity.

51. Defendents' policy and practice to deny benefits upon this basis is unwarranted in fact, arbitrary, capricious, and in violation of the due process clause of the Fifth Amendment, Social Security Act and defendants' regulations.

SECOND CLAIM FOR RELIEF

Violations of the Administrative Procedure Act and the Federal Register Act

52. The standards, practices, and policies adopted and enforced by defendants for determining mental disability are embodied in POMS, Quality Assurance Reviews, the Psychiatric Review Form, Program Circulars, training

instructions and other internal memoranda, which constitute substantive rules of prospective application within the meaning of the Administrative Proceduce Act and the Federal Register Act.

53. The Secretary has failed to publish such rules and regulations in the Federal Register or to afford opportunity for adequate notice and comment as required by law.

54. Application of the Secretary's policies and practices without notice or publication further denies due process of law to the individual plaintiffs and the members of the class whom they represent.

THIRD CLAIM FOR RELIEF

Failure to Adopt Meaningful Standards

55. A fair and realistic assessment of residual functional capacity to work, despite the presence of severe mental impairment, requires the assessment of objective criteria which can be used to realiably predict whether a chronic mental patient can engage in substantial gainful activity within the meaning of the Social Security Act. These factors include, *inter alia,* analysis of recent prior work history, analysis of the reaction of the patient to stressful situations, analysis of the risk and effect of possible recurrence of psychotic symptoms, and the evaluation in a work setting or work-like setting of the mentally inpaired applicant.

56. Although these criteria are essential to any realistic determination of disability, defendants have failed to adopt meaningful regulations or standards which allow consideration of these factors, relying instead only upon the broad definition of "residual functional capacity" set forth at 20 C.F.R. § 404.1545(c).

57. Defendants' failure to adopt and apply meaningful standards and procedures for determining residual functional capacity has resulted in the arbitrary and irrational

denial of benefits to many individuals who satisfy all relevant statutory criteria. Upon information and belief, the failure to adopt meaningful standards has further elevated putative "interpretations" and "guidelines" for application of the regulations to the level of policy.

58. Defendants' failure to adopt and apply meaningful regulations, standards, and procedures for determination of mental disability in light of relevant vocational and medical factors violates the requirements of the Social Security Act and of the due process clause of the Fifth Amendment.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court enter judgment:

1. DECLARING that defendants' policy and practice requiring that those persons whose mental impairment does not meet or equal the Listings of Impairments set forth in SSA regulations should be denied SSD and SSI benefits on the ground that they retain sufficient residual capacity to do at least unskilled work is arbitrary, capricious, and contrary to law; and further

2. DECLARING that defendants' policy and practice constitutes a substantive rule of prospective application which has not been published in the Federal Register as required by the Administrative Procedure Act, the Federal Register Act, and the requirements of due process and is thus null, void and of no legal effect; and further

3.ENJOINING defendants from continuing, attempting to continue, or otherwise enforcing the standard that an SSD or SSI claimant who suffers from a severe mental impairment which does not meet or equal the Listings of Impairments retains the residual functional capacity for at least unskilled work, and from drawing any conclusion regarding the extent of residual functional capacity to

engage in substantial gainful activity from the fact that the individual fails to meet or equal the Listings of Impairments; and further

4. DIRECTING defendants to review all claims of all class members whose applications for benefits were denied on or after April 1, 1980, on a priority basis; and to notify all such class members that their claims for benefits are being reviewed, that the initial denial may have been in error, that the SSA may be asking for additional evidence relating to the impairment, and that if the SSA determines that the initial denial was in error the claimant will be entitled to back benefits from the date of the application; and further

5. DIRECTING defendants to restore ongoing benefits commencing with the date of the Order to all class members whose benefits have been terminated on or after April 1, 1980; and further

6. DIRECTING defendants to immediately commence rule-making proceedings, with provision for adequate public notice and comment, to adopt new and appropriate regulations and standards for the determination of the entitlement to SSD or SSI benefits by reason of mental disability; and further

7. Awarding plaintiffs such other and additional relief as the court deems just and proper, plus costs and attorney's fees.

DATED: NEW YORK, NEW YORK
OCTOBER 11, 1983

Respectfully submitted,

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REGIONAL
SSA PROGRAM CIRCULAR

DISABILITY INSURANCE

No. 8-80 Date: June 10, 1980
OFFICE OF THE REGIONAL COMMISSIONER – NEW YORK

Vocational Factors In Mental Impairment Cases

The following is a summary of advice from Central Office on adjudication of mental impairment cases where the impairment is severe but does not meet/equal the listings.

In the usual sequential evaluation process, we consider whether or not a decision can be made on the basis of medical factors alone, i.e. does the impairment meet/equal the listings or is it not severe (slight). Where vocational factors must be considered, we determine if the claimant can do past work or has the capacity for unskilled work.

The mental components of unskilled work include the ability to:

- Remember, understand and carry out simple (primarily oral) instructions and procedures independently.
- Respond appropriately to work pressures, co-workers and ordinary supervision.
- Sustain work which meets the standards of SSA on a regular and continuing basis in a routine work setting (meet production norms and quality standards and sustain adequate attendance).

Where a mental impairment does not meet/equal a 12.00 listing, it will generally follow that the individual has the capacity for at least unskilled work as described above. If it is found that such a claimant clearly can *not* perform one or more of these basic demands the DDS should consider the following:

EXHIBIT A

- Reexamination of the evidence in such cases may reveal that the impairment *does* meet/equal the severity contemplated by the listings, or
- Reexamination of the evidence may reveal that the restrictions indicated in the functional assessment (RFC) are overstated and the impairment is actually not severe (is slight).

In the rare instance when a claimant does not meet/equal the listings but does have a severe (more than slight) impairment, vocational factors must be assessed. Inability to perform one or more of the basic demands of unskilled work would merit a vocational allowance, even in a younger worker. It should be noted, however, that in most psychiatric cases that do not meet/equal the listings, there are no gross limitations in the ability to hear, speak, or reason. Further, a mental impairment which restricts close contact with others would restrict a claimant from doing work where contact with others is a *critical* factor. Most unskilled work, however, involves working with things rather than people. Thus the capacity for unskilled work represents a broad work capacity for any claimant.

In assessing severity of a psychiatric impairment, we consider the findings on mental status exam and the description of the claimant's current daily functioning (activities, interests, ability to relate, ability to care for personal needs). Residual functional capacity is not a separate issue from severity rating. RFC is assessed simultaneously with severity. Therefore, where mental status and daily functioning evidence have been found to indicate an impairment short of the listings (but severe) the RFC would be simultaneously assessed. Findings should not be counted twice to further restrict RFC.

Note: In mental retardation cases, the subtest scores may indicate poor visual–motor coordination, limited attention span, etc. Where the full-scale, verbal, or performance I.Q. reveals a moderate/moderately

severe impairment (i.e. I.Q. 60-79) the subtest scores should simultaneously be consulted for RFC assessment. Attention span, etc. abnormalities should not, however, be counted twice to increase the severity rating.

Although we have mentioned equivalency to the mental impairment listings, we must note that equivalency in psychiatric cases should be rare. Equivalency is used where there is no listing for the condition, the condition is manifested by findings other than those listed, or there is a combination of significant impairments. The equivalency concept is often incorrectly applied. Since the 12.00 listings cover all types of mental impairments and since the listings also cover the manifestations of these conditions (mental status and daily functioning), an equivalency determination is generally inappropriate where there is solely a mental impairment.

Distribution: All DDS's in the New York Region

Retention date: January 1981

E&T Report #62

New York State
Department of Social Services
Office of Disability Determinations
110 William Street
New York, NY 10038

Date: November 4, 1982

To: All Medical & Professional Staff
From: Marvin S. Lachman
Subject: Development & Evaluation of Psychiatric CDI Cases

I. INTRODUCTION

Since February of this year, three Evaluation and Training Reports have been issued in the above series. Now that we have had at least six months experience in evaluating psychiatric CDI claims under Maximum Assurance, we are combining these releases in this E&T report, so that adjudicators can find current office instructions in one place.

II. GENERAL GUIDELINES FOR DEVELOPMENT

By its very nature, a psychiatric impairment is one in which a single report may not reflect a true picture of a claimant's condition and his ability to function. It should be viewed as one point in time in the longitudinal picture of an individual impairment. The adjudicator must be alert to the particular problems that are often involved in evaluating mental impairments in individuals who have long histories of repeated hospitalizations and/or prolonged outpatient care with supportive therapy and high dosages of drugs. The following guidelines should be followed before there is consideration of purchase of a CE.

EXHIBIT B

A. Medical Evidence of Record (MER) must be requested from all sources, (including social agencies or rehabilitation facilities) identified on the SSA-454a, with whom the claimant has had contact within the *last 12 months.* The initial request and at least one follow-up to each source must be documented in the file with the dates and description of the development attempts, as per DD-229. A form DF-236 must be completed whenever the MER cannot be obtained.

B. The type of medical information required in the Listings regarding daily activities, interests, and ability to relate to other people is generally a matter of record when a claimant has been treated within the last three months in a psychiatric facility. If the response by such a facility to a request for evidence of record does not provide sufficient details, a telephone call should be made, if permissible, to a psychiatric social worker there. The social worker should be asked for information about these areas of functioning, provided they are in medical records signed by a physician.

C. It is never appropriate to order a psychiatric CE on a CDI case as the only evidence requested.

III. PSYCHIATRIC SOCIAL SURVEY

The above service will be ordered under the circumstances described below. Whenever it is ordered, DD-10.11 should be followed.

A. It is not possible to obtain a longitudinal history and evidence of claimant's impairment from treating sources.

B. It was not possible to obtain a longitudinal history and evidence of claimant's condition covering the last three months of the claimant's impairment from treating sources, a psychiatric CE was obtained, and a cessation is proposed.

Note 1: Whenever a psychiatric social survey is ordered, it should always be in conjunction with a psychiatric examination. However, arrangements must be made to have the survey performed *prior* to the psychiatric examination and the survey report sent to the psychiatrist in accord with DD-10.11.

Note 2: If a psychiatric social worker is unavailable in the claimant's location when one is needed in accord with A or B above, a second psychiatric CE must be purchased, with the report of the first psychiatrist going to the second psychiatrist before the latter's examination.

IV. REFUSAL TO GO FOR A CONSULTATIVE EXAMINATION

Refusal to cooperate or go for a CE should never be the basis for automatic cessation if the claimant has a psychiatric impairment. As required in POMS 2027H and DD-236, other action is necessary, including third party assistance, consideration of an examination in the claimant's home, an SSA District Office face-to-face contact, and development of lay evidence. To obtain face-to-face contact, send an SSA-883 to the District Office, but do not transmit the entire case file. A case would not be ready for adjudication until the file shows that the District Office has either contacted the claimant or made all efforts to do so.

V. CONSIDERATION IN DECIDING PSYCHIATRIC CDI'S

A. In weighing the evidence in the determination process, it is important that the findings on which the decision is based be included in the case file. Inferences or unsupported conclusion may not be ignored or form the basis for a cessation. For example, if the CE psychiatrists says, "He wants us to believe he cannot remember," the report must contain the find-

ings that show the claimant can, in fact, remember. If the treating psychiatrists say the claimant has a severe heart condition, he must be requested to provide the findings and, if he has none, to indicate he has no basis for his conclusion.

B. As Program Circular 2-80 points out, "Many claimants are, however, able to care in some fashion for basic needs yet have severe pathology. When the psychopathology is so severe that *all* the claimant can do is find food, shelter and clothing and nothing else, them marked restriction of activities, interests and social behavior is present." Evidence that the claimant engages in cooking, shopping, and cleaning to the extent of caring for basic needs would not be at variance with the above Program Circular and should not be the basis for a cessation.

C. Assumptions regarding daily activities, based upon incomplete descriptions, can often lend to wrong decisions. Therefore, a statement that a claimant watches television or listens to radio would not document lack of restriction of activities and interests. We must find out if a claimant watches with comprehension, or only sits in front of an open set with no real awareness. Similarly, a statement that a claimant has a boyfriend or a girlfriend should not lead to an automatic assumption that there is not seriously impaired ability to relate to others. We should obtain enough evidence to be sure that this relationship is inconsistent with listing-level psychopathology.

D. *Deciding Psychiatric Cases on Medical/Vocational Grounds*

1. Under POMS 2387.6b, a claimant who has a severe psychiatric impairment, (albeit of less severity than required by the Listings), is of advanced age, has no work history, and has a limited education or less would be allowed.

2. Other claimants have severe physical impairments which do not meet or equal the Listings, but restrict them to sedentary work. If they also have severe mental impairments, even if they also do not meet or equal the Listings, that would further restrict their work range because there are sedentary jobs they could not perform due to significant restrictions in psychiatric functioning. Therefore, where the claimants has no skills or where the mental impairment negates all transferable skills, an allowance would be appropriate because the claimant is effectively restricted to less than a full range of sedentary work. (See POMS 2388B.10, Example 2 and Informational Digest D1.02c).
3. Psychiatric allowances in impairments which do not meet or equal the Listings are possible, although they are rare, as stated in Regional Program Circular 8-80. Where medical evidence clearly shows that a claimant, even a younger worker, cannot perform one or more of the following basic demands of unskilled work, a vocational allowance would be appropriate:
   a. Remember, understand and carry out simple (primarily oral) instructions and procedures independently.
   b. Respond appropriately to work pressures, coworkers, and ordinary supervision.
   c. Sustain work which meets the standards of SGA on a regular and continuing basis in a routine work setting (meet production norms and quality standards and sustain adequate attendance).

Note 1: It is not appropriate to give as an RFC in an psychiatric claim the following statement: "Can do simple, routine repetitive tasks in non-stressful

situations." RFCs in psychiatric cases must specifically cover the basic demands of unskilled work listed above.

Note 2: In cessations, the rationale must specifically state whether or not the claimant can perform those functions listed above.

VI. POSSIBILITY OF SUICIDE

Where the file shows the claimant has present or past suicidal inclinations, DD-259 should be followed. In addition, special care should be taken to be certain that all necessary documentation as described above is in the file. If it still appears that a cessation is warranted, as a final safeguard, a psychiatrist must give written approval before due process notification is sent to the claimant.

ACTION NOTE

This replaces E&Ts 62, 62.1, and 62.2 which should be destroyed.

MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

DATE: March 19, 1980
Refer to: SJH-2

To: Division of Preadjudicative Policy
From: Medical Consultant Staff
Subject Psychiatric Impairments and RFC (New York RO Memo, 2-26-80)

INFORMATION

The New York Regional Office has asked guidance as to what abnormalities on the mental status examination would indicate inability to sustain which basic elements of unskilled work. "Unskilled work is defined as work which requires little or no judgment in performance of simple duties which can be learned on the job in a short period of time" (Informational Digest No. 79-29). How to translate information from the mental status findings and use it to determine ability or inability to sustain unskilled work is not an overly difficult task.

The Guide for Use of the Psychiatric Review Form (PRF; official designation Form SSA-2506-U4) facilitates the uniform and reliable application of the disability guides contained in the psychiatric portion of the Listing of Impairments. It is intended as a means whereby the reviewing psychiatrist, after a thorough review of all relevant information in an applicant's file, can systematically record his conclusions regarding the presence and intensity of a variety of signs, symptoms, and behaviors. These separate conclusions are subsequently combined to yield the required judgment as to overall degree of impairment in each of three major areas of functioning: Effective Intelligence, Affective Status, and Reality Contact. The ratings in all major areas of functioning on the PRF refer

EXHIBIT C

to the applicant's status from the time relevant to the alleged onset of disability through the date of the last medical evidence. Each item is to be rated for presence and severity according to the following five-point scale:

Rating: 1 Normal—no problem in this area
2 Slight degree—definitely not disabling
3 Moderate degree
4 Moderately severe degree
5 Severe—disabling degree (Listings met or equaled)

The findings of the mental status examination can be translated into a numerical scale that gives an idea as to the claimant's level of impairment as well as his ability to perform unskilled work. For instance, can a person understand and follow simple directions, and perform simple tasks without supervision? The lower (more normal) the rating in the area of Effective Intelligence, the better equipped the claimant is to understand, to follow directions, and to perform tasks of varying complexity. Next, can a claimant respond appropriately to supervision, to coworkers, and to customary work pressures? This can be deduced from the ratings made in the Affective Status and Reality Contact areas. An individual who scores more than "2" in any of these areas would certainly be more limited in his capacity to respond appropriately to supervision, coworkers, and customary work pressures than would a person with a score of "1" or "2."

Psychiatrists or physicians are expected to have some expertise in recognizing psychopathology and in rendering a prognosis. Thus, their reports might include opinions on such matters as the ability to cope with stress and the ability to relate to other people and to function in a group situation. The DDS psychiatrist should be able to extract such information from the reports, and if adequately trained in the PRF, he should be able to translate such information into PRF ratings with their corresponding implications for ability to engage in unskilled work.

With respect to item 3, the question is raised as to what weight to give findings such as poor visual-motor coordination, limited attention span, etc., that may have been used in the IQ assessment. As before, these aspects should be taken into consideration in making the PRF ratings in the Effective Intelligence area. However, it would be clearly inappropriate to use these same deficiencies in assessing RFC.

If all of the above seems somewhat confusing, it is basically because the wrong question is being asked. Residual functional capacity is not a separate factor—it is merely what *remains* (RFC) after the severity of impairment is *subtracted* from normal functional status. In the Mental Disorders, at least a *Total Psychiatric Impairment* rating of less than "5" signifies the ability to engage in SGA at the level of unskilled work or higher. Where it does not mean precisely that, the PRF is being improperly used. Thus, where the PRF is properly employed, a separate RFC rating would be redundant and tantamount to giving double weight to the same case aspects.

JOSE G. PUIG, M.D.
Acting Chief Consultant in Psychiatry and Neurology

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Answer
[Filed June 22, 1983]

CV 83-0457 [JBW]

THE CITY OF NEW YORK, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, STATE OF NEW YORK, CESAR PERALES, AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, WILLIAM F. MORRIS, AS ACTING COMMISSIONER OF THE NEW YORK STATE OFFICE OF MENTAL HEALTH, AND JANE DOES I, II, AND III AND RICHARD ROES I, II, III AND IV ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND JOHN A. SVAHN, AS COMMISSIONER OF THE UNITED STATES SOCIAL SECURITY ADMINISTRATION, DEFENDANTS.

Defendants Margaret M. Heckler and John A. Svahn, by their attorney, Raymond J. Dearie, United States Attorney for the Eastern District of New York, for their answer to plaintiffs' complaint herein state:

First: Admit the allegations in paragraphs 5, 6, 10, 11 and 30.

Second: Deny the allegations in paragraphs 2, 3, 4, 21, 22, 25, 41, 42, 43, 46, 47, 48, 49, 50, 51, 52, 54, 55 and 56.

Third: Defendants lack sufficient knowledge or information upon which to admit or deny the allegations in paragraph 19.

Fourth: As to the allegations contained in paragraph 1, this paragraph contains plaintiffs' characterization of their lawsuit to which no answer is required, but insofar as an answer may be deemed to be required the allegations are denied.

Fifth: As to the allegations in paragraph 7, defendants admit the first sentence; as to the remainder of this paragraph, defendants have insufficient knowledge or information to admit or deny the allegations, except to specifically deny the wrongful denial or termination of Title II or Title XVI benefits.

Sixth: As to the allegations in paragraph 8, defendants lack knowledge or information sufficient to admit or deny, except to specifically deny the wrongful denial or termination of Title II or Title XVI benefits.

Seventh: Paragraph 9 contains plaintiffs' characterization of their lawsuit to which no answer is required, but insofar as an answer may be required, the allegations are denied.

Eighth: Deny except to admit Jane Doe I was a recipient of disability benefits under Titles II and XVI of the Social Security Act based upon a mental impairment, that such benefits were terminated, that an Administrative Law Judge decided plaintiff's disability had ceased with benefits terminating with the close of August, 1982, and that the Administrative Law Judge's decision was approved by the Appeals Counsel.

Ninth: As to paragraph 13, the defendants have no basis upon which to admit or deny the allegations therein except through the administrative appeal process provided pursuant to 42 U.S.C. § 401 *et seq.* and § 1381 *et seq.* and the regulations thereunder which Jane Doe II has not exhausted.

Tenth: As to paragraph 14, the defendants have no basis upon which to admit or deny the allegations therein except through the administrative appeal process provided pur-

suant to 42 U.S.C. § 401 *et seq.* and § 1381 *et seq.* and the regulations thereunder which Richard Roe I has not exhausted.

Eleventh: As to paragraph 15, the defendants have no basis upon which to admit or deny the allegations therein except through the administrative appeal process provided pursuant to 42 U.S.C. § 401 *et seq.* and § 1381 *et seq.* and the regulations thereunder which Richard Roe II has not exhausted.

Twelfth: As to paragraph 16, the defendants have no basis upon which to admit or deny the allegations therein except through the administrative appeal process provided pursuant to 42 U.S.C. § 401 *et seq.* and § 1381 *et seq.* and the regulations thereunder which Richard Roe III has not exhausted.

Thirteenth: As to paragraph 17, the defendants have no basis upon which to admit or deny the allegations therein except through the administrative appeal process provided pursuant to 42 U.S.C. § 401 *et seq.* and § 1381 *et seq.* and the regulations thereunder which Richard Roe IV has not exhausted.

Fourteenth: Paragraph 18 contains plaintiffs' characterization of their lawsuit to which no answer is required, but insofar as an answer may be deemed to be required, the allegations are denied.

Fifteenth: As to the allegations in paragraph 20, defendants deny knowledge or information sufficient to admit or deny, except to specifically deny the last sentence.

Sixteenth: As to the allegations in paragraph 23, defendants deny knowledge or information sufficient to admit or deny, except to admit that such a letter was filed with the complaint.

Seventeenth: As to paragraph 24, defendants deny sufficient knowledge or information upon which to admit or deny the allegations of this paragraph, except that defendants deny that plaintiffs are representative of a class of individuals.

Eighteenth: Paragraph 26 contains plaintiffs' characterization of Section 223(d) of the Social Security Act, 42 U.S.C. § 423(d), to which the Court is respectfully referred.

Nineteenth: Paragraph 27 contains plaintiffs' characterization of the standard of disability under the Supplemental Security Income program which is found at 42 U.S.C. § 1382c(a)(3)(A) incorporating 42 U.S.C. § 423(d), to which the Court is respectfully referred.

Twentieth: As to the allegations in paragraph 28, admit and affirmatively state that the relationship between the Secretary and the agency of the State making disability determinations is fully set forth at 42 U.S.C. § 421 and in 20 C.F.R. §§ 404.1601 *et seq.* and 416.1001 *et. seq.* and 416.1001 *et. seq.* to which the Court is referred.

Twenty-First: As to paragraph 29, admit the first sentence; the second sentence is admitted but the Court is respectfully referred to the provisions of P.L. 97-455 which amend the requirement of 42 U.S.C. § 421(i) that cases be reviewed at least once every 3 years.

Twenty-Second: Paragraph 31 contains plaintiffs' characterization of 20 C.F.R. §§ 404.1505 and 416.905 *et seq.* to which the Court is referred.

Twenty-Third: Admit paragraph 32 and allege that the entire regulatory explanation of substantial gainful activity is found at 20 C.F.R. §§ 404.1510, 404.910, 416.971 *et seq.*

Twenty-Fourth: Paragraph 33 contains plaintiffs' characterization of the "sequential evaluation process" to which no answer is required. The Court is referred to 20 C.F.R. §§ 404.1520 and 416.920 for a full and complete statement of the sequential evaluation process provided for under Titles II and XVI of the Social Security Act.

Twenty-Fifth: Paragraph 34 contains plaintiffs' characterizations of the Listing of Impairments; the Court is respectfully referred to 20 C.F.R. §§ 404.1525(a) and

416.925(a) as well as 20 C.F.R. Part 404, Subpart P, Appendix 1.

Twenty-Sixth: Paragraph 35 contains plaintiffs' characterization of the "residual functional capacity" evaluation set forth at 20 C.F.R. §§ 404.1545, 416.905, to which the Court is respectfully referred.

Twenty-Seventh: As to the allegations in paragraph 36, deny and affirmatively state that pursuant to the sequential evaluation process persons whose mental impairments do not meet or equal the Listings of Impairments may be denied disability benefits because they retain sufficient residual functional capacity to return to their past relevant work or to engage in other substantial gainful activity which exists in the national economy.

Twenty-Eighth: As to the allegations in paragraph 37, deny the 1st sentence; as to the remainder of the paragraph, the Court is referred to Exhibit A for a full and complete statement of the contents of Program Circular 8-80.

Twenty-Ninth: As to the allegations in paragraph 38, deny and the Court is referred to Exhibit B for a full and complete statement of the contents thereof.

Thirtieth: As to the allegations in paragraph 39, deny and affirmatively state that the relevant provisions governing the use of the Psychiatric Review Form in disability determinations are found in SSA Program Operation Manual System ("POMS") § 2211.

Thirty-First: As to the allegations in paragraph 40, deny and the Court is referred to Exhibit C for a full and complete statement of the contents thereof.

Thirty-Second: As to the allegations in paragraph 44, deny sentences 1 and 2 and affirmatively state that the Social Security Administration has had a system of continuing disability investigation and that the 1980 Amendments to the Social Security Act required periodic review of cases every 3 years. Pursuant to this statutorily mandated periodic review the Social Security Administration sends files to the State Disability Determination Services (DDS's) for the updating of medical evidence and determination of continuing disability. As to the third sentence, deny except to admit than an "accelerated" or "profile" periodic review was begun of Title II and concurrent Title II and Title XVI disability benefits recipients. Deny the fourth sentence and affirmatively state that the selection of cases for periodic review was not made on the basis of the body system of the benefits recipient's impairment. As to the last sentence, defendants lack sufficient knowledge or information to admit or deny.

Thirty-Third: As to the allegations in paragraph 45, deny the first sentence. Deny knowledge or information sufficient to form a belief as to the second sentence and affirmatively state that the periodic review process was accelerated, rather than the continuing disability investigations. As to the third and fourth sentences, defendants lack sufficient knowledge or information to admit or deny. Deny the fifth sentence. As to the last sentence, deny knowledge or information sufficient to admit or deny.

Thirty-Fourth: Paragraph 53 contains conclusions of law to which no answer is required, but to the extent an answer is deemed required, the allegations are denied.

AFFIRMATIVE DEFENSES

FIRST: The complaint fails to state a claim upon which relief can be granted.

SECOND: Plaintiffs lack standing to maintain this action.

THIRD: The Court lacks jurisdiction over the subject matter of this action.

FOURTH: The complaint does not present a justiciable case or controversy.

FIFTH: Defendants' actions are in compliance with applicable law and regulations.

WHEREFORE, defendants demand judgment dismissing the complaint herein with costs and disbursements.

Respectfully submitted,

RAYMOND J. DEARIE
United States Attorney
Eastern District of New York

By: /s/ REUBEN S. KOOLYK
Assistant United States Attorney

Of Counsel:
ANNETTE H. BLUM
Regional Attorney
GAIL N. MANCHER
Assistant Regional Attorney
Office of the General Counsel
Department of Health and Human Services

MATERIALS FROM ADMINISTRATIVE RECORDS PERTAINING TO INDIVIDUAL PLAINTIFFS

a. JANE DOE I

Plaintiffs' Exhibit 43
(Notice of initial determinations and request for a hearing)

Social Security
Notice 140

From: Department of Health, Education, and Welfare
Social Security Administration
EAW: 4/26/82 J-R 10

Date: 6/4/82

Claim Number:

[Deleted from Document]
c/o Tran Srv
235-61 Hillside Ave.
Jamaica, NY 11427

[Deleted from Document]

This notice concerns your continuing entitlement to benefits under the Social Security Disability program.

The law provides that an individual's disability period shall end if the person is able to do substantial gainful work. The law also provides that an individual will receive benefit payments for the month disability ends and the following two months. The medical evidence in your case shows that you became able to do substantial gainful work in 5/82. Accordingly, the last disability benefit check to which you are entitled is for the month of 7/82.

You were initially found to be disabled because of a mental disorder. The medical evidence shows that you have had the ability to care for your needs, the ability to travel by yourself, some difficulty relating to other people, and some difficulty in stressful situations. We realize you are unable to perform certain kinds of work. However, you are able to perform a job in which you would not work closely with other people, and a job in which you would have simple tasks.

If your condition again prevents you from doing substantial gainful work before age 62, you should get in touch with your social security office about filing a new application for disability benefits. If you act promptly and are again found entitled to disability benefits, your benefit payments may start with the first full month in which you were again disabled.

The decision on your claim was made by the Social Security Administration on the basis of a disability determination by an agency of the State in which you live. Physicians and other trained disability evaluation personnel in the State agency participated in making this determination.

This decision refers only to your claim for benefits under the Social Security Disability Insurance Program. If you have not already received a decision about your payments under the Supplemental Security Income Law, you will receive it shortly by a separate notice.

Please get in touch with social security if:

You believe the decision shown on the other side of this notice is wrong, or

You have any questions or need more information.

Most questions can be handled by phoning or writing any social security office. If you visit a social security office, please bring this notice with you. If the decision on your case is based on incorrect information, we'll be happy to make whatever change is necessary.

YOUR RIGHT TO APPEAL

If you still are not satisfied with the decision, you may request a hearing of this decision by the Bureau of Hearings and Appeals. YOU MUST REQUEST THE HEARING IN WRITING WITHIN 60 DAYS FROM THE DATE YOU RECEIVE THIS NOTICE.

APPEAL WITHIN 10 DAYS IF YOU WANT THE PRIOR PAYMENT CONTINUED

If you want your prior payment continued until the hearing is completed, you must request a hearing in writing within 10 days of receiving this notice. If you request a hearing within 10 days, we will continue or reinstate the prior payment until a hearing decision is made, no matter how long it takes. Depending on the outcome of your appeal, you may have to pay back any money you were not entitled to receive. For this reason you may want to waive continuation or reinstatement of the prior payment; then, if you are successful on appeal, any money due you will be paid.

If you cannot send us a written request for a hearing within the 10 and 60-day time limits, be sure to contact us by phone. IF YOU WAIT LONGER THAN 10 DAYS, WE WILL NOT REINSTATE THE PRIOR PAYMENT UNLESS YOU HAVE GOOD REASON FOR THE DELAY. AND, IF YOU WAIT LONGER THAN 60 DAYS AND DO NOT HAVE GOOD REASON FOR THE DELAY, WE WILL NOT CONDUCT A HEARING REVIEW OF YOUR DECISION.

If you request a hearing, your case will be assigned to a presiding officer of the Bureau of Hearings and Appeals. We will let you know when and where your hearing will take place.

The hearing proceedings are informal. The presiding officer will summarize the facts in your case, explain the law, and state what must be decided. Then you will have an opportunity to explain why you disagree with the decision made in your case, to present additional evidence and to have witnesses testify for you. You can also request us to subpoena unwilling witnesses to appear for cross-examination and to bring with them any information about your case. If you decide not to appear at the hearing, you still have the right to submit additional evidence. The presiding officer will base his decision on the evidence in your file plus any new evidence submitted.

In having your case heard, you can represent yourself or be represented by a lawyer, friend, or any other person. Contact your social security office for names of organizations that can help you.

Social Security
Notice

142

From: Department of Health, Education, and Welfare
Social Security Administration
EAW: 4/26/82 J-R 10
Date:

[Deleted from Document]
c/o Tran Service
235-61 Hillside Ave.
Jamaica, NY 11427

Claim Number:
[Deleted from Document]

-2-

Medicare coverage for a disabled beneficiary begins with the 25th consecutive month of entitlement to disability benefits. If you are currently entitled or scheduled to become entitled to Medicare the month after the date of this notice, your coverage under Medicare ends the last day of 7/82 since you are no longer entitled to disability benefits. If you are not entitled to Medicare as described above, you are not entitled to any coverage. This notice supersedes information you may have received concerning Medicare coverage.

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Please get in touch with social security if:

You believe the decision shown on the other side of this notice is wrong, or

You have any questions or need more information.

Most questions can be handled by phoning or writing any social security office. If you visit a social security office, please bring this notice with you. If the decision on your case is based on incorrect information, we'll be happy to make whatever change is necessary.

YOUR RIGHT TO APPEAL

If you still are not satisfied with the decision, you may request a hearing of this decision by the Bureau of Hearings and Appeals. YOU MUST REQUEST THE HEARING IN WRITING WITHIN 60 DAYS FROM THE DATE YOU RECEIVE THIS NOTICE.

APPEAL WITHIN 10 DAYS IF YOU WANT THE PRIOR PAYMENT CONTINUED

If you want your prior payment continued until the hearing is completed, you must request a hearing in writing within 10 days of receiving this notice. If you request a hearing within 10 days, we will continue or reinstate the prior payment until a hearing decision is made, no matter how long it takes. Depending on the outcome of your appeal, you may have to pay back any money you were not entitled to receive. For this reason you may want to waive continuation or reinstatement of the prior payment; then, if you are successful on appeal, any money due you will be paid.

If you cannot send us a written request for a hearing within the 10 and 60-day time limits, be sure to contact us by phone. IF YOU WAIT LONGER THAN 10 DAYS, WE WILL NOT REINSTATE THE PRIOR PAYMENT UNLESS YOU HAVE GOOD REASON FOR THE DELAY. AND, IF YOU WAIT LONGER THAN 60 DAYS AND DO NOT HAVE GOOD REASON FOR THE DELAY, WE WILL NOT CONDUCT A HEARING REVIEW OF YOUR DECISION.

If you request a hearing, your case will be assigned to a presiding officer of the Bureau of Hearings and Appeals. We will let you know when and where your hearing will take place.

The hearing proceedings are informal. The presiding officer will summarize the facts in your case, explain the law, and state what must be decided. Then you will have an opportunity to explain why you disagree with the decision made in your case, to present additional evidence and to have witnesses testify for you. You can also request us to subpoena unwilling witnesses to appear for cross-examination and to bring with them any information about your case. If you decide not to appear at the hearing, you still have the right to submit additional evidence. The presiding officer will base his decision on the evidence in your file plus any new evidence submitted.

In having your case heard, you can represent yourself or be represented by a lawyer, friend, or any other person. Contact your social security office for names of organizations that can help you.

Supplemental Security Income
Notice of Planned Action – Medical 146

From: Department of Health and Human Services
Social Security Administration
EAW: 4/26/82 J-R 10

[Illegible]
Date: [Illegible]

[Deleted from Document]

Social Security Number:
[Deleted from Document]

c/o Tran Service
235-61 Hillside Ave.
Jamaica, NY 11427

Your payments (or those of the individual named above) will be changed as follows: Based on the evidence in your case, including review by a physician of an agency of your State, it has been found that your medical condition was not disabling effective with [Illegible]. If you meet all other requirements of the law, you can receive Supplemental Security Income payments based on disability for a 2 month period after disability ends. Therefore, [Illegible] is the last month you could be eligible for payments.

You were initially found to be disabled because of a mental disorder. The medical evidence shows that you have had the ability to care for your needs, the ability to travel by yourself, some difficulty relating to other people, and some difficulty in stressful situations. We realize you are unable to perform certain kinds of work. However, you are able to perform a job in which you would not work closely with other people, and a job in which you would have simple tasks.

This decision refers only to your claim for Supplemental Security Income Payments. Any decision about your benefits under the Social Security Disability Insurance Program will be sent to you in a separate notice.

For information about any change in your Medicaid eligibility caused by this action, you should get in touch with your social services agency.

Although we plan to take the action shown above, you may have your prior payment continued or reinstated if you request an appeal within 10 days of receiving this notice.

Important: See other side for an explanation of your appeal rights and other information ►

Form SSA-L8156-U2 (8-77) (Formerly SSA-8156A)
Prior editions may be used until supply is exhausted

Please get in touch with social security if:

You believe the decision shown on the other side of this notice is wrong, or

You have any questions or need more information.

Most questions can be handled by phoning or writing any social security office. If you visit a social security office, please bring this notice with you. If the decision on your case is based on incorrect information, we'll be happy to make whatever change is necessary.

YOUR RIGHT TO APPEAL

If you still are not satisfied with the decision, you may request a hearing of this decision by the Bureau of Hearings and Appeals. **You must request the hearing in writing within 60 days from the date you receive this notice.**

Appeal Within 10 Days If You Want The Prior Payment Continued

If you want your prior payment continued until the hearing is completed, you must request a hearing in writing within 10 days of receiving this notice. If you request a hearing within 10 days, we will continue or reinstate the prior payment until a hearing decision is made, no matter how long it takes. Depending on the outcome of your appeal, you may have to pay back any money you were not entitled to receive. For this reason you may want to waive continuation or reinstatement of the prior payment; then, if you are successful on appeal, any money due you will be paid.

If you cannot send us a written request for a hearing within the 10 and 60-day time limits, be sure to contact us by phone. **If you wait longer than 10 days, we will not**

reinstate the prior payment unless you have good reason for the delay. And, if you wait longer than 60 days and do not have good reason for the delay, we will not conduct a hearing review of our decision.

If you request a hearing, your case will be assigned to an administrative law judge of the Bureau of Hearings and Appeals. He/she will let you know when and where your case will be heard.

The hearing proceedings are informal. The administrative law judge will summarize the facts in your case, explain the law, and state what must be decided. Then you will have an opportunity to explain why you disagree with the decision made in your case, to present additional evidence and to have witnesses testify for you. You can also request us to subpoena unwilling witnesses to appear for cross-examination and to bring with them any information about your case. You have the right to request the administrative law judge to issue a decision based on the written record, without you personally appearing before him/her. You may submit additional written evidence for the administrative law judge to consider. The administrative law judge will base his decision on the evidence in your file plus any new evidence submitted.

In having your case heard, you can represent yourself or be represented by a lawyer, friend, or any other qualified person. Contact your social security office for names of organizations that can help you.

BEST AVAILABLE COPY

Take or Mail to your local Social Security Office

148

[redacted]

SOCIAL SECURITY NUMBER
[redacted]

SPOUSE'S NAME AND SOCIAL SECURITY NUMBER
(Complete ONLY in Supplemental Security Income Cases)

(Check One)
Initial Entitlement ☐
Termination or other Post Entitlement Action ☒

Type Claim (Check One)

Retirement or Survivors	Only	☐ (RSI)
Disability, Worker or Child	Only	☐ (DI)
Disability, Widow or Widower	Only	☐ (DW)
SSI, Aged	Only ☐ (SSIA)	With Title II Claim ☐ (SSA)
SSI, Blind	Only ☐ (SSIB)	With Title II Claim ☐ (SSA)
SSI, Disability	Only ☐ (SSID)	With Title II Claim ☒ (SSD)

Other (Specify)

I disagree with the determination made on the above claim and request a hearing. My reasons for disagreement are:

After the Dan said to my doctor and we left our psychiatrist Dr. Rosalita Dr. not able to Refer me to a Doctor

Check one of the following:

☐ I have additional evidence to submit (Attach such evidence to this form or forward to the Social Security Office within 10 days.)

☐ I have no additional evidence to submit

Check ONLY ONE of the statements below:

☒ I wish to appear in person.

☐ I do not wish to appear at a hearing. I request that a decision be made on the basis of the evidence in my case.

Signed by: (Either the claimant or representative should sign. Enter addresses for both. If claimant's representative is not an attorney, complete Form SSA-1696.)

SIGNATURE OF NAME OF CLAIMANT'S REPRESENTATIVE

☐ ATTORNEY ☐ NON ATTORNEY

CLAIMANT'S SIGNATURE
[redacted]

ADDRESS

ADDRESS C/O TRANSLATIONS UNLIMITED
235-61 Hillside Ave

CITY, STATE, AND ZIP CODE

CITY, STATE, AND ZIP CODE
Jamaica N.Y. 11427

TELEPHONE NUMBER

DATE
06-17-82
(Claimant should not fill in below this line)

TELEPHONE NUMBER
464-3772

TO BE COMPLETED BY SOCIAL SECURITY ADMINISTRATION

Is this request timely filed? ☒ YES ☐ NO

If "No" is checked: (1) Attach claimant's explanation for delay, (2) Attach any pertinent letter, material, or information in the Social Security Office

Interpreter Needed _____ (Language)

ACKNOWLEDGMENT OF REQUEST FOR HEARING

This request for hearing was filed on 06/17/82 at 90-25 161 St, Jamaica N.Y. 11432

The Administrative Law Judge will notify you of the time and place of the hearing at least 10 days in advance of the hearing.

HEARING OFFICE COPY

TO:
☒ Hearing Office JAMAICA, N.Y. 11432
(Location)
148-43 Hillside Ave

☐ _____ (Claims Involving SSI)
(Location)

☐ Supplemental Security Income Claims Involved

CLAIM FILE COPY

TO
☐ Hearing Office

Claim File(s) Requested by Teletype to _____

☐ ACB (BOP)

RECEIVED
JUN 21 1982
OFFICE OF HEARINGS & APPEALS

For the Social Security Administration:

By: J. Smith [redacted]
(Signature)

Claims Representative
(Title)

90-25 161 St.
(Street Address)

Jamaica, N.Y. 11432
(City, State, and Zip Code)

Servicing Social Security Office Code 120 [redacted]

Form HA-501-U5 (7-78)

CLAIM FILE

[redacted]

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CLAIMANT'S STATEMENT WHEN REQUEST FOR HEARING IS FILED AND THE ISSUE IS DISABILITY

PLEASE READ PRIVACY ACT STATEMENT ON REVERSE: Print, type, or write clearly and answer all questions to the best of your ability. (If you are acting on behalf of someone else, also answer all questions to the best of your ability.) Complete answers will aid in processing the claim. IF ADDITIONAL SPACE IS NEEDED, ATTACH A SEPARATE STATEMENT TO THIS FORM.

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CLAIMANT'S NAME	SOCIAL SECURITY NUMBER
[redacted]	[redacted]

1. Have you worked since _____, the date your request for reconsideration was filed? (If yes, describe the nature and extent of work.) → ☐ Yes ☒ No

2. Has there been a change in your condition since the above date? (If yes, describe the change.) → ☐ Yes ☒ No

3. Have your daily activities changed since the above date? (If yes, describe the changes.) → ☐ Yes ☒ No

4. Have you been treated or examined by a doctor (other than as a patient in a hospital) since the above date? (If yes, complete the following.) → ☐ Yes ☐ No

NAME AND ADDRESS OF DOCTOR(S)	DATE OF EXAM	MEDICAL PROBLEM
Dr. [illegible], 110-20 [illegible]	[illegible]	[illegible]
[illegible], 110-20 [illegible]	[illegible]	" "

5. Have you been a patient in a hospital since the above date? (If yes, complete the following.) → ☒ Yes ☐ No

NAME AND ADDRESS OF HOSPITAL(S)	DATE OF HOSPITALIZATION	MEDICAL PROBLEM
[illegible]	[illegible]	[illegible]

6. Are there community agencies that have medical or vocational records that you did not tell us about before? (If yes, list the agencies or employers who have such records.) → ☐ Yes ☒ No

7. Are you now taking any prescription drugs or medications? (If yes, list them below.) → ☒ Yes ☐ No

NAME OF MEDICATION(S)	DOSAGE BEING TAKEN	NAME OF PHYSICIAN(S)
Lithium	300mg 3x's a day	Dr Foley
Lasix	40mg 1x's a day	" "

8. Are you now taking any nonprescription drugs or medications? (If yes, list them below.) → ☐ Yes ☒ No

NAME OF MEDICATION(S)	DOSAGE BEING TAKEN

Knowing that anyone making a false statement or representation of a material fact for use in determining a right to payment under the Social Security Act commits a crime punishable under Federal Law, I certify that the above statements are true.

SIGNATURE OF CLAIMANT OR PERSON FILING ON THE CLAIMANT'S BEHALF	DATE SIGNED
SIGN HERE [redacted]	6/17/82

Form HA-4489 (9-80)
Prior editions may be used until supply is exhausted

[redacted]

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PRIVACY ACT NOTICE

The collection of information on this form is authorized by the Social Security Act (section 205(a) of Title II, section 702 of Title VII, and sections 1631(e)(1)(A) and (B) of Title XVI, as appropriate). The information provided will be used to further document your claim. Information requested on this form is voluntary, but failure to provide all or any part of the requested information may affect the determination of your claim. Information you furnish on this form may be disclosed by the Social Security Administration to another person or governmental agency only with respect to social security programs and to comply with Federal laws requiring the disclosure of information or the exchange of information between the Social Security Administration and another agency.

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U S GOVERNMENT PRINTING OFFICE 1981 — 341 187 103

DECISION OF THE ADMINISTRATIVE LAW JUDGE
DATED SEPTEMBER 16, 1982

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

[redacted]

Refer to:

OFFICE OF HEARINGS AND APPEALS

Name and Address of Claimant:

[redacted]
c/o Transitional Services
235-61 Hillside Avenue
Jamaica, N.Y. 11421

NOTICE OF DECISION—DENIAL
PLEASE READ CAREFULLY

If you disagree, in whole or in part, with the enclosed decision you may request the Appeal Council to review it. However, your request for review must be filed within 60 days after the date of receipt of this notice. It will be presumed that this notice is received within 5 days after the date shown below, unless a reasonable showing is made otherwise.

If you wish to request review, you (or your representative) should file the request at your local social security office. The people there will supply you with a request for review form and will be glad to assist you in completing the form. However, if you prefer, you may file your request for review at the hearing office or by sending a letter, requesting review, directly to the Appeals Council, Office of Hearings and Appeals, P.O. Box 2518, Washington, D.C. 20013.

Unless you file a timely request for review by the Appeals Council, you may not obtain a court review of your case under section 205(g), 1631(c)(3), or 1869(b) of the Social Security Act.

This notice and enclosed copy of hearing decision mailed

September 16, 1982

BX
[redacted]

BEST AVAILABLE COPY

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

DECISION

In the case of

Claim for
Period of Disability,
Disability Insurance
Benefits and Supplemental Security Income
(Cessation)

[Deleted from Document]
(Claimant)

[Deleted from Document]
(Social Security Number)

(Wage Earner) (Leave blank if same as above)

ISSUES

The issues to be determined are whether claimaint's entitlement to a period of disability under section 216(i), to disability insurance benefits under section 223(a), and eligibility for supplemental security income under section 1614(a) (3) of the Social Security Act, as amended, has ended. The specific issues are whether claimant's disability has ceased, and if so when.

APPLICABLE LAW AND REGULATION

Section 216(i) of the Social Security Act, as here pertinent, provides for the establishment of a period of disability for an individual when the requirements of the Act are met and, in effect, that such period shall end with the close of the last day of the second calendar month following the month in which such individual's disability ceases.

Section 223(d) (2) (A) of the Social Security Act, as amended, provides that "an individual (except a widow, surviving divorced wife, or widower for purposes of section 202(e) or (f)) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether he would be hired if he applied for work. For purposes of the preceding (with respect to any individual) 'Work which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives or in several regions in the country." Section 223 also provides, in effect, that entitlement to disability insurance benefits shall end with the close of the second month following in which such individual's disability ceases.

Form HA-514 U9 (9-81)
Use Prior Stock

CLAIM FILE

Section 404.1539(a) of Social Security Administration Regulations No. 4 provides that an individual's disability shall be found to have ceased in whichever of the following is the earlier: (1) The month in which the impairment, as established by the medical or other evidence, is no longer of such severity as to prevent him from engaging in substantial gainful activity; or (2) the month in which the individual has regained his ability to engage in substantial gainful activity, after application of the provisions in section 404.1536.

Section 1611(c)(1) provides, in part, that "Eligibility for and the amount of such benefits for any quarter shall be redetermined at such time or times as may be provided by the Secretary."

Section 1631(a)(5) of the Social Security Act provides that "Payment of the benefit of any individual who is an aged, blind, or disabled individual solely by reason of blindness (as determined such under section 1614(a)(3)), and who ceases to be blind or to be under such disability, shall continue (so long as such individual is otherwise eligible) through the second month following the month in which such blindness or disability ceases."

Section 216(i) of the Social Security Act provides for the establishment of a period of disability, and section 223 of the Act provides for the payment of disability insurance benefits where the requirements specified therein are met.

Section 223(d)(1) and 1614(a)(3)(A) of the Social Security Act (42 U.S.C. 423(d)(1) and 42 U.S.C. 1382(a)(3)(A)) define disability as the inability to "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . . "

Sections 223(d)(3) and 1614(a)(3)(C) of the Act define a "physical or mental impairment" as "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

Sections 404.1520(c) and 416.920(c)) of Social Security Administration Regulations Nos. 4 and 16, respectively, (20 CFR 404.1520(c) and 416.920(c)) provide that if an individual does not have any impairments which significantly limit physical or mental ability to do basic work activities, a finding shall be made that the individual does not have a severe impairment and, therefore, is not disabled regardless of age, education, and work experience.

Regulations 404.1521(b) and 416.921(b) (20 CFR 404.1521(b) and 416.921(b)) define basic work activities to mean the abilities and aptitudes necessary to do most jobs. Examples of these abilities and aptitudes include physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; capacities for seeing, hearing, and speaking; understanding, carrying out, and remembering simple instructions; use of judgement; responding appropriately to supervision, co-workers, and usual work situations; and dealing with charges in a routine work setting.

EVIDENCE CONSIDERED

The administrative law judge has carefully considered all the testimony at the hearing, the arguments made, and the documents described in the List of Exhibits attached to this decision.

EVALUATION OF THE EVIDENCE

The claimant seeks continuance of a period of disability, disability insurance benefits and supplemental security income benefits based on her manic depressive illness. The Administration had determined that her impairment was no longer preclusive of substantial gainful activity in May 1982 (Exhibits B-2 and B-4), and so benefits were to have terminated at the close of July 1982. Claimant was duly notified of this decision in June 1982 (Exhibits B-3 and B-5), and claimant in response thereto requested hearing on June 17, 1982 (Exhibits B-6). The hearing was held in Jamaica, New York with claimant present, accompanied by Marquerite Murphy, a Human Resources Coordinator, and Bill Palmer, a counselor, both from the Transitional Services Program. Claimant was not represented by an attorney, although advised of her right to legal counsel.

Claimant was not and is not now engaging in substantial gainful activity.

Claimant's Testimony

Claimant testified that she was 30 years old, five feet two inches tall, 240 pounds, divorced, and living within the Transitional Services Program. She said she completed Hofstra College in 1974 concentrating on Spanish, and subsequently, an additional graduate rehabilitation coun-

seling course, but more recently took two courses in library science at Queens College, only one of which was completed. Her work background consisted of librarian jobs at Hofstra University from August 1974 to March 1977 and at the Queensborough Public Library from August 1977 to April 1980. Her duties included checking books in and out on a computer, filing, typing, shelving books and other clerical tasks, all of which entailed three to four hours of sitting, standing three hours, and pushing heavy stalls weight up to 100 pounds.

Claimant contends that she cannot work because her concentration is disrupted and she is fidgety, does not get along with co-workers, and is very depressed. She said she was also very emotionally upset and agitated. She admitted, however, that she had been doing some volunteer work, three days each week, performing mainly library duties while under medication.

-4-

In 1978 she indicated she was treated for a month at Booth Memorial Hospital because of a manic episode with delusions and hallucinations, and treated an additional month at Elmhurst General Hospital. In 1979 she asked to be taken to Queens General Hospital as she was depressed and crying constantly. An overdose in 1980 resulted in a 3-1/2 month Creedmoor admission, with discharge into the Transitional Services Program. She was divorced in 1980 after her suicide attempt. In 1981 she returned to Creedmoor for two weeks because of her depression and delusions that someone was going to rape her. She then went back to Transitional Services briefly, before a stay from July 1981 to October 1981 at Long Island Jewish Hillside Medical Center where she was maintained on Lithium and Loxitane to control her depression, suicidal impulses and hallucinations. She continues to take two Lithium tablets three times a day and four Loxitane pills daily which help her to sleep. She stated she sees Dr. A. Paley twice monthly at the Arista Center for Psychotherapy, and since February 1982 has visited another therapist, E. Halens, twice a week. She is presently in Phase III of the Transitional Services Program and mentioned she had suicidal feelings about a week before the hearing but no overt acts.

Bill Palmer advised this forum that the cap program entails Phase I which is dormitory style living with 24 hours a day supervision. Phase II is a community residence, living in an apartment within a complex with a counsellor available, but not supervised. Phase III is living with three or four other program participants in an apartment, occasionally visted by a counselor.

Because of her overall condition, claimant estimated she could stand an hour; sit a couple of hours; concentrate and think for 1/2 hour, but bend, kneel, hear and use her hands normally. No pain is alleged. She testified that she reads; watches t.v.; writes poetry; walks about five blocks;

visits a couple of friends and talks on the telephone to pass the time. She can manage her own affairs, do laundry, clean, do dishes and cook. She appeared at hearing to be neat, intelligent, alert and exhibited good speech, although she alleged she was confused and could not come to responsible resolutions of various situations.

Claimant's counselor, Bill Palmer, revealed claimant started in Phase III in February 1982 living with two others until July 1982. He noted she had serious problems reacting to the stress of a job, problems as to punctuality; co-worker relations, and following directions. While she attended two courses at the Office of Vocational Rehabilitation, he felt she would not lower her status to accept work unbefitting her. Claimant was returned to Phase I on July 26, 1982 because she was experiencing trouble; some suicidal ideation emerged and had to be evaluated. At that time, she required an atmosphere of minimal stress.

Medical Evidence

A report from Transitional Services for New York, Inc. dated July 26, 1982 and signed by non-physician directors verified claimant had been a resident there since August 13, 1980, and as of that writing she was in Phase III a "community-based, supportive apartment program." She had been in Phase III since February 4, 1982 and "has functioned marginally during this time." The recitation of the psychiatric history indicated claimant has had multiple psychiatric admissions beginning in 1978 and in each year thereafter except the current year. Hospitalizations were precipitated by either severe depression and suicidal attempts, or agitated behavior with impaired-reality testing, excessive spending, loss of appetite, diminished sleep and heightened activity level. The vocational history was as indicated above in claimant's testimony. As to current functioning, it was noted:

> In the last year, client has had episodes of depression agitation, and severe anxiety accompanied by severe self-isolation and inability to sustain daily functioning . . . These episodes have been managed with outpatient treatment . . . averting the need for inpatient hospitalization. At present, [the claimant] is moderately depressed with suicidal ideation. Client has severely impaired self-esteem and ability to sustain relationships with peers. She is quite self-isolating, has no friends and finds it difficult to function at a task around others. These difficulties, in conjunction with impaired thinking (racing, disorganized and obsessive thoughts, poor concentration and attention span, difficulties expressing her thoughts) have made it impossible for her to sustain herself in a volunteer position. . . . Our assessment . . . is that she continues to need the support and structure of Transitional Services as well as ongoing therapy and a structured day program. [The claimant] is unable to sustain paid employment at present and is unlikely to be capable of such work within the next few years.

Claimant was reported to be attending weekly psychotherapy and taking Lithium and Loxitane. Claimant's goals were said to be further rehabilitation within the program including improved daily functioning, despite moodswings, in interpersonal relationships responsibilities in maintaining an apartment and consistent attendance and participation in a vocational rehabilitation setting. (Exhibit B-19).

The Arista Center for Psychotherapy where claimant attends weekly sessions indicated in a letter dated July 23, 1982 that claimant "has deteriorated since her last visit . . ."

> Although not actively suicidal or grossly psychotic there was much more evidence of a thought disorder; her affect was quite flat and she seemed quite unconnected (Exhibit B-21).

-6-

Dr. Anne M.N. Paley, Medical Director at the Arista Center submitted a more detailed medical summary on July 21, 1982. The history revealed claimant was in an aftercare program at Hillside Hospital and living in Transitional Services Housing from November 11, 1981 to February 1982. In February 1982 she was readmitted to Arista and seen twice weekly for individual supportive psychotherapy and once bi-weekly for medication as appropriate. Claimant was noted to be obese and Lithium level was stablized at about 1.0. The diagnosis was: Axis I manic depressive illness, circular type, Axis II mixed personality disorder, Axis III obesity, Axis IV mild severity of pschyosocial stressors and Axis V poor adaptive functioning at the highest level the past year. Treatment and response was what has been already indicated, plus Dr. Paley felt

> What emerges over, in the treatment history of this patient is her extreme fragility. Although she is intelligent, articulate and highly presentable, she has demonstrated over and over again that she is unable to handle ever small environmental changes, without . . . severe psychiatric symptoms, often requiring hospitalization.

The doctor considered claimant's judgement impaired and felt she was intelligent and verbal enough to easily mislead those who are ignorant of her history that she is certainly capable of doing a lot more than she is. The estimated degree of impairment on work related functions was adjudged mostly moderately severe to severe (Exhibit B-16).

Consulting psychiatrist, Dr. J. Fiks on March 8, 1982 diagnosed claimant as suffering from manic depressive illness, circular type. Claimant's complaints were described as ideas of reference, delusions of persecution, obsession with sexual preoccupation, and excessive spending. Suicidal thoughts and depression were additionally noted. On mental status evaluation claimant was found to be . . .

an obese black female who weighs 236 pounds and is five feet two inches tall. She comes in bizarre looking, over made up, but clean. Her speech at times was vague and irrelevant. Eventually under a great deal of pressure. She became coherent and relevant. There is no evidence of loosening of associations. At times the claimant has ideas of reference and delusions of persecution. There is no evidence of hallucinations. She is obsessed with ideas of sexual content. There is no evidence of compulsions, phobias or morbid preoccupations. At the time of the examination, her mood was labile. Her affect appropriate. She is oriented to time, place and person. Memory for recent and remote events spotty. Attention and concentration span limited. Insight and judgement limited, to poor.

Claimants Mode of Living—According to [the claimant] she still has trouble going to the supermarket because she does not know how to take care of her personal needs, such as shopping and she does not know what is right and what is wrong and how much she needs. She seems to be able to attend school and socialize to a very limited extent. . .

In my opinion the claimant is not capable of handling benefit payments on her behalf because she goes on spending sprees and uses extremely poor judgement in managing her financial affairs.

The degree of restriction on work related capacities was mostly mild to moderate (Exhibit B-15).

On March 2, 1982, Dr. Paley indicated claimant had been seen at the Arista Center since June 12, 1978 for her severe mental problem. On last examination on March 2, 1982 claimant was "obese, neatly dressed and groomed. Relates to examiner in a rather childlike manner." Her speech was reportedly rapid and somewhat pressured and she seemed preoccupied with her difficulty adjusting to a new living situation. Her mood was mixed, affect, labile and shallow but appropriate, intelligence above average, sensorium clear, judgement poor and insight fair. Relating to others was considered a major problem. Curiously, she was considered competent to handle any benefit payment (Exhiibit B-14).

Claimant was admitted to Creedmoor Psychiatric Center from June 19, 1982 to July 6, 1981. She was admitted on an emergency basis, being then, "very delusional" with mood elated, increased psychomotor activity, impaired reality testing. Claimant improved rapidly on medication and on discharge she was alert, well-groomed with mood stable speaking coherently and relevantly, not delusional, without suicidal or homocidal intentions well

oriented, and fair insight and judgement. The report noted no physical problems; that she was no longer acutely psychotic and that she had a tendency to stop taking medication. She was diagnosed manic depressive illness, manic, atypical or mild personality, with mild severity of psychosocial stressors, poor adaptive functioning at the highest level this past year (Exhibit B-13). Claimant has hospitalized there earlier from June 12, 1980 to August 13, 1980 with diagnosis of schizophrenia, chronic undifferentiated. Discharge was with condition improved and prognosis guarded (Exhibit B-12).

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Evaluation

Although there is abundant evidence to show claimant was disabled based on her mental impairment as per the administrative law judge's decision of December 5, 1980, I find by February 1982, claimant no longer had any severe mental impairment which would be a significant limitation on the performance of basic work related functions. On March 2, 1982 after examination by the treating psychiatrist, claimant was considered competent to handle her own funds in spite of other problems adjusting to a new living situation (Exhibit B-14). Consultative psychiatric review on March 8, 1982 found manic depressive illness, circular type with no evidence of hallunications, no evidence of loosening of associations; coherent and relevant speech; no evidence of compulsions; phobias or morbid preoccupations and good orientation. In spite of some trouble adapting to her mode of living, claimant's mental impairment was nonetheless considered mostly mild to moderate restriction of basic work functions (Exhibit B-15). By July 23, 1982, the Arista Center reported claimant's condition deteriorating, with much more evidence of a thought disorder but not actively suicidal or grossly psychotic (Exhibit B-21). As of February 1982 claimant was in the Transitional Services Program Phase III "community-based supportive apartment" living, and functioning marginally. Goals were further rehabilitation within the program.

Claimant's own testimony verifies that she is an intelligent, well-educated and industrious individual, she has taken graduate courses in library science, completing at least one and she has attempted volunteer work even during her disability. Medication seems to control her depression and on-going therapy appears to maintain functioning. She

reads; watches t.v.; writes poetry; walks about; socializes with friends; can care for her own personal needs; do laundry, cook; clean and do dishes. Her appearance at hearing was neat and alert, her speech was relevant keen and coherent. She has above-average intelligence. Although the testimony indicates claimant is presently 236 pounds and is obese, she moved gracefully and unrestricted. In fact, her outward bearing was not of a person of that alleged weight. In any event there was no evidence that would indicate her present weight would interfere with her basic work related functions.

Her counselor indicated she returned to Phase I recently for evaluation but the most recent medical report of Dr. Ann Paley, dated July 23, 1982, stated that claimant is not actively suicidal or grossly psychotic. There was some evidence of thought disorder. Claimant can thus function adequately and perform basic work-related activities. Both the consulting and treating psychiatrists find the manic depressive illness, circular type to be somewhat limiting, but the restrictions are mild to moderate according to the consulting psychiatrists and in a very conservative estimation, moderately severe to severe according to Dr. Paley. Claimant up until the end of July 1982

was living in a minimally supportive program and only recently temporarily reverted to a more structured set-up. Even so no hospitalization, no additional therapy sessions, and no increased medication was recommended.

The evaluation of disability applications on the basis of mental disorders requires consideration of the nature and clinical manifestations of the medically determinable impairment(s) as well as consideration of the degree of limitation such impairment(s) may impose on the individual's ability to work, as reflected by (1) daily activities both in the occupational and social spheres; (2) range of interest; (3) ability to take care of personal needs; and (4) ability to relate to others. This evaluation must be based on medical evidence consisting of demonstrable clinical signs (medically demonstrable phenomena, apart from the individual's symptoms, which indicate specific abnormalities of behavior, affect, thought, memory, orientation, or contact with reality) and laboratory findings (including psychological tests) relevant to such issues as restriction of daily activities, constriction of interests, deterioration of personal habits (including personal hygiene), and impaired ability to relate to others.

In that regard, claimant has shown an ability to relate to others since the evidence indicated she is presently residing with two others in an apartment in a minimally supervised setting. It is also evident that claimant is capable of taking care of her personal needs, does her own laundry, cleans her own room, washes the dishes and does her own cooking. She has been able to function in her daily activities and has performed some voluntary work in her selected occupation. No evidence establishes that claimant has any persistent marked restriction of daily activities and constriction of interests or impaired ability to relate to other people.

Claimant presently does have some depression but no hallucinations or delusions; illogical associations of ideas, psychomotor disturbances nor any other clinical signs with any persistence at the present time. This is not to say claimant does not have some restrictions due to her diagnosed mental condition of manic depressive illness and mixed personality disorder but she has a strong contact with reality and ability to relate to other people. I find she is presently in remission and her symptomotology is not of such significance as to prevent her from engaging in substantial gainful employment.

Claimant can perform basic work associated activities and so her mental impairment was not severe by February 1982 when she began functioning in an unstructured environment and living in an apartment with others. Accordingly she was no longer entitled to benefits with the close of April 1982 as her disability ceased in February 1982.

However, the Commissioner of Social Security has decided that, except in certain circumstances which do not apply in this case, the month of cessation of disability will be no earlier than the month in which the claimant was first notified by the Social Security Administration that it had determined that disability ceased. The record in this case shows that this notice was sent to the claimant in June 4, 1982 (Exhibit B-3). Thus, claimant's benefits should terminate with the close of August 1982 the second month after the month in which disability was deemed ceased, by due process.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. Claimant was receiving supplemental security income and disability insurance benefits under application filed May 8, 1980.

2. Claimant was born on October 11, 1951 and is presently 30 years of age. She is a college graduate with credits earned in 1982, towards her Masters Degree.

3. Claimant's impairments have been diagnosed as manic depressive illness, circular type and mixed personality disorder.

4. Claimant's impairments are presently in remission.

5. The medical evidence of record establishes that claimant's impairments or any combination

thereof do not significantly limit her ability to perform work-related functions as of February 1982 and therefore claimant does not have a severe impairment.

6. Since claimant does not have a severe impairment, she was not under a disability as defined in the Social Security Act at any time since February 1982.

7. The record indicates claimant was capable of performing substantial gainful activity on or about February 1982.

8. The evidence of record fails to establish that at anytime from February 1982 through the date of this decision, the claimant's impairments were of a level of severity which under the Social Security Act, as amended, is deemed supposed to preclude an individual from engaging in any substantial gainful activity.

9. A notice of cessation of supplemental security income and disability insurance benefits was sent to claimant on or about June 4, 1982; therefore although the Administrative Law Judge finds your disability actually ceased on February 1982, a finding is hereby made that your disability ceased on June 1982 and that your benefits should terminate at the end of August 1982, the second month after the month in which disability was deemed ceased, by due process.

DECISION

It is the decision of the Administrative Law Judge that claimant ceased to be entitled to supplemental security income and disability insurance benefits under sections 1602, 216i and 223 respectively of the Social Security Act as amended, with the close of August 1982, the end of the second month, after the month in which disability was considered ceased after due process was afforded.

/s/ MARILYN HOPPENFELD
MARILYN HOPPENFELD
Administrative Law Judge

September 16, 1982
DATE

DECISION OF THE APPEALS COUNCIL DATED NOVEMBER 8, 1982

DEPARTMENT OF HEALTH & HUMAN SERVICES
Social Security Administration
[Deleted from Document]

November 8, 1982

Refer to:
SGC
[Deleted from Document]

Office of Hearings and Appeals
PO Box 2518
Washington DC 20013

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

[Deleted from Document]
c/o Transitional Services
235-61 Hillside Avenue
Jamaica, NY 11427

[Deleted from Document]
[Deleted from Document]
[Deleted from Document]
[Deleted from Document]

Dear [Deleted from Document]:

Re: Your Claims for Disability Insurance Benefits and Supplemental Security Income

The request for review of the hearing decision in your case has been considered. Sections 404.970 and 416.1470 of Social Security Administration Regulations Nos. 4 and 16 (20 CFR 404.970 and 416.1470) provide that the Appeals Council will grant a request for review of a hearing decision where: (1) there appears to be an abuse of discretion by the administrative law judge; (2) there is an error of law; (3) the administrative law judge's action, findings, or conclusions are not supported by substantial evidence, or

(4) there is a broad policy or procedural issue which may effect the general public interest.

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for review. Accordingly, your request is denied and the hearing decision stands as the final decision of the Secretary in your case.

In reaching this conclusion, the Appeals Council carefully considered the additional medical report dated September 23, 1982 from Dr. Paley, and the statements of October 6, 1982 and October 7, 1982, from Ms. Lyon and Ms. Murphy, respectively. The information provided is essentially the same as that provided in earlier reports (Exhibits B-14, 17, 19 and 21) which are already of record and were considered by the administrative law judge in his decision. There is no new information in these reports that would provide a basis for changing the hearing decision in your case.

If you desire a court review of the hearing decision, you may commence a civil action in the district court of the United States in the judicial district in which you reside within sixty (60) days from the date of receipt of this letter. It will be presumed that this letter is received within five

(5) days after the date shown above unless a reasonable showing is otherwise made. See sections 205(g) and 1631(c)(3) of the Social Security Act, as amended (42 U.S.C. 405(g) and 1383(c)(3)) and section 422.210 of Social Security Administration Regulations No. 22 (20 CFR 422.210).

If a civil action is commenced, your complaint should name the Secretary of Health and Human Services as the defendant and should include the Social Security number(s) shown at the top of this notice.

Sincerely yours,

David G. Danziger
Member, Appeals Council

cc:
HO, Jamaica, NY (ALJ Hoppenfeld)

b. JANE DOE II

Plaintiffs' Exhibit 44
(Notice of initial determinations reconsiderations)

Social Security
Notice of Disapproved Claim

From: Department of Health and Human Services
Social Security Administration
wdd 8/24/82 II/C/5

Date: 8/25/82
Claim Number:
[Deleted from Document]

[Deleted from Document]
90 Boerum Hill 50 Nevins
Hill
Brooklyn, NY 11217

We have determined that you are not entitled to disability insurance benefits because you do not meet the disability requirement of the law. In reaching this decision we considered how much your condition has affected your ability to work. After carefully studying your records, including the medical evidence and your statements, and considering your age, education, training, and experience, it has been determined that your condition is not disabling within the meaning of the law.

If your condition should get worse and prevent you from doing any substantial gainful work, you should get in touch with any social security office about filing another disability application. An explanation of the disability requirement and the earnings requirement is given on the back of this notice.

If you believe that this determination is not correct, you may request that your case be re-examined. If you want this reconsideration, you must request if not later than 60 days from the date you receive this notice. You may make your request through any social security office. If additional evidence is available, you should submit it with your request. Please read the enclosed leaflet for a full explanation of your right to question the determination made on your claim.

If you do not request reconsideration of your case within the prescribed time period, you still have the right to file another application at any time.

If you have any questions about your claim, you may get in touch with any social security office. Most questions can be handled by telephone or mail. If you visit an office, however, please take this letter with you.

Enclosure: [Deleted from Document]
SSA Pub. No. 05-10058

Important: See other side for additional information

Department of Health and Human Services
Social Security Administration
Form SSA-L808.1T-U2 (4-81)
Prior editions may be used

DEPT OF HEALTH AND HUMAN SERVICES
wdd 8/24/82 II/C/5

DISABILITY DETERMINATION RATIONALE

[Illegible] Claimant [Deleted from Document] SSN [Deleted from Document]

The determination on your claim was made by an agency of the State and not by the individuals or agencies who submitted reports. The evidence used to decide your claim was obtained from Dr. Levvy, report of 5/19/82; St. Vincent's Hospital, report of 3/22/82. We did not obtain any other reports because this gave us enough information. You said you were disabled because of a mental disorder. The medical evidence shows that you have had the ability to function normally in every day life, the ability to care for your needs, the ability to travel by yourself, and some difficulty relating to other people. Since you were treated, your condition has stabilized.

We realize that your condition prevents you from returning to your usual job, however, there are many other jobs that you can do.

WE's Name (If CDB or DWB Claim)		Type of Claim		(Initial and Date)
Disability Examiner DDS	Date	Review Physician DDS	Date	
Disability Examiner SSA	Date	Disability Examiner SSA	Date	

FORM SSA-4268-U6 (8-80)

1. FOLDER COPY

Supplemental Security Income
Notice of Reconsideration - Disability

From: Department of Health and Human Services
Social Security Administration/pg 10/27/82
IIC/R3

Date:

[Deleted from Document]
[Illegible] Boerun Hill
50 Nevins St.
Brooklyn, NY 11217

Social Security Number:
[Deleted from Document]
Reconsideration filed

Upon receipt of your request for reconsideration we had your claim independently reviewed by a physician and disability examiner in the State agency which works with us in making disability determinations. The evidence in your case has been thoroughly evaluated; this includes the medical evidence and the additional information received since the original decision. We find that the previous determination denying your claim was proper under the law. Attached to this notice is an explanation of the decision we made in your claim and how we arrived at it.

If you believe that the reconsideration determination is not correct, you may request a hearing before an administrative law judge of the Office of Hearings and Appeals. If you want a hearing, you must request it not later than 60 days from the date you receive this notice. You may make your request through any social security office. Read the enclosed leaflet and the reverse side of this notice for a full explanation of your right to appeal.

Please get in touch with social security if you believe this decision is wrong or you have any questions or need more information. Most questions can be handled by phoning

or writing any social security office. If you visit a social security office, please bring this notice with you. If the decision in your case is based on incorrect information, we'll be happy to make whatever change is necessary.

[Deleted from Document]

Enclosure:
SSA Pub. No. 70-10281

Important: See other side for an explanation of your appeal rights and other information

Form SSA-L1130-U2 (8-80)

YOUR RIGHT TO APPEAL

If you still are not satisfied with the decision, you may request a hearing of this decision by the Office of Hearings and Appeals. YOU MUST REQUEST THE HEARING IN WRITING WITHIN 60 DAYS FROM THE DATE YOU RECEIVE THIS NOTICE. If you cannot send us a written request for a hearing within 60 days, be sure to contact us by phone. If you wait longer than 60 days, we will not conduct a hearing review of our decision unless you have a good reason for the delay.

If you request a hearing, your case will be assigned to an administrative law judge of the Office of Hearings and Appeals. The administrative law judge will let you know when and where your case will be heard.

The hearing proceedings are informal. The administrative law judge will summarize the facts in your case, explain the law, and state what must be decided. Then you will have an opportunity to explain why you disagree with the decision made in your case, to present additional evidence and to have witnesses testify for you. You can also request the administrative law judge to subpoena unwilling witnesses to appear for cross-examination and to bring with them any information about your case. If you decide not to apear at the hearing, you still have the right to submit additional evidence. The administrative law judge will base the decision on the evidence in your file plus any new evidence submitted.

In having your case heard, you can represent yourself or be represented by a lawyer, a friend, or any other person. Contact your social security office for names of organizations that can help you.

Social Security
Notice of Reconsideration

From: Department of Health and Human Services
Social Security Administration. wpg 10/27/82
IIC/R3

Date:

[Deleted from Document]
[Illegible] Boerun Hill
50 Nevins St.
Brooklyn, NY 11217

Claim Number:
[Deleted from Document]

Claim for
☐ Disability Insurance Benefits
☐ Disabled Widow, Widower Benefits
☐ Childhood Disability Benefits

Upon receipt of your request for reconsideration we had you claim independently reviewed by a physician and disability examiner in the State agency which works with us in making disability determinations. The evidence in your case has been thoroughly evaluated; this includes the medical evidence and the additional information received since the original decision. We find that the previous determination denying you claim was proper under the law. The reverse of this notice identifies the legal requirements for your type of claim.

If you believe that the reconsideration determination is not correct, you may request a hearing before an administrative law judge of the Office of Hearings and Appeals. If you want a hearing, you must request it not later than 60 days from the date you receive this notice.

You may make your request through any social security office. Read the enclosed leaflet for a full explanation of your right to appeal.

If you do not request a hearing of your case within the prescribed time period, you still have the right to file another application at any time.

If you have questions about your claim, you should get in touch with any social security office. Most questions can be handled by telephone or mail. If you visit an office, however, please take this letter with you.

Enclosure: [Deleted from Document]
SSA Pub. No. 70-10282 [Deleted from Document]

Important: See other side for additional information

Form SSA-1,928-U2 (8-80)
Prior editions may be used until supply is exhausted

DEPT OF HEALTH AND HUMAN SERVICE
Security Administration

wpg 10/27/82 IIC/R

DISABILITY DETERMINATION RATIONALE

Name of Claimant	SSN
[Deleted from Document]	[Deleted from Document]

The determination on your claim was made by an agency of the State and not by the individuals or agencies who submitted reports. The evidence used to decide your claim was obtained from Boerum Hill Residence (Psychiatrist) report of 9/82, St. Vincents Hospital, (in-patient) report of 4/82, and J. Fiks, MD, (Psychiatric) consultative examination report of 10/8/81. Reports were obtained from every source you gave us. You said you were disabled because of a mental disorder. The medical evidence shows that you had an emotional disorder, and the ability to function normally in every day life. We realize you are unable to perform certain kinds of work. However, you are able to perform a job in which you would not work closely with other people.

We realize that your condition prevents you from returning to your usual job, however, there are many other jobs that you can do.

WE's Name (If CDB or DWB Claim)		Type of Claim		(Initial and Date)
Disability Examiner DDS	Date	Review Physician DDS	Date	
Disability Examiner SSA	Date	Disability Examiner SSA	Date	

FORM SSA-4268-U6 (8-80)

1. FOLDER COPY

Defendants' Exhibit I

(Administrative Law Judge's
decision dated July 31, 1983)

FURTHER ACTION
NECESSARY

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

Name and Address of Claimant:
Ms. [Deleted from Document]
[Deleted from Document]
[Deleted from Document]
[Deleted from Documnet]

NOTICE OF FAVORABLE DECISION
PLEASE READ CAREFULLY

The enclosed decision is favorable to you, either wholly or partly. If you are satisified with the decision, there is no need for you to contact the hearing office or the Social Security office. You will be notified as soon as action on the decision has been completed.

If you disagree with the decision, you have the right to request the Appeals Council to review it within 60 days from the date of receipt of the notice of this decision. It will be presumed that this notice is received within 5 days after the date shown below, unless a reasonable showing is made otherwise. You (or your representative) may file a request for review at your local Social Security office or at the hearing office, or you may write or telephone these offices indicating your intent to request review. You may also submit a written request for review directly to the Appeals Council, Office of Hearings and Appeals, SSA, P.O. Box 2518, Washington, D.C. 20013.

The Appeals Council may, on its own motion, withing 60 days from the date shown below, review the decision, which could possibly result in a change in the decision (20 CFR 404.969 and 416.1469). After the 60 day period, the Appeals Council generally may only reopen and revise the decision on the basis of new and material evidence, or if a clerical error has been made as to the amount of the benefits or where there is an error as to the decision on the face of the evidence on which it is based (20 CFR 404.988 and 416.1488; 42 CFR 405.750 and 405.1570). If the Appeals Council decides to review the enclosed decision on its own motion or to reopen and revise it, you will be notified accordingly.

Unless you timely request review by the Appeals Council or the Council reviews the decision on its own initiative, you may not obtain a court review of your case (section 205(g), 1631(c)(3), or 1869(b) of the Social Security Act).

This notice and enclosed copy of
decision mailed
January 31, 1983

cc:
Name and Address of Representative:
•

DEFENDANT'S
EXHIBIT
1

CLAIM FILE

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

EFFECTUATION NECESSARY
DECISION

In the case of

_____
(Claimant)

_____
(Wage Earner) (Leave blank if same as above)

_____

Claim for
Period of Disability, Disability Insurance Benefits &
Supplemental Security Income

_____
(Social Security Number)

This case is before the administrative law judge on a request for hearing.

ISSUES

The general issues before the administrative law judge are whether the claimant is entitled to a period of disability and to disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, as amended; and whether the claimant is disabled under section .614(a)(3)(A) of the Social Security Act. The specific issues are whether the claimant was under a "disability," as defined in the Act; if so, when such "disability" commenced and the duration thereof; and whether the special earnings requirements of the Act are met for the purpose of entitlement to a period of disability and disability insurance benefits.

**EVALUATION OF THE EVIDENCE—
APPLICABLE REGULATIONS**

Section 404.1520(b) and 416.920(b) of the regulations (20 CFR 404.1520(b) and 416.920(b)) provide that an individual who is working and engaging in substantial gainful activity will not be found to be "disabled" regardless of medical findings. Sections 404.1520(c) and 416.920(c) (20 CFR 404.1520(c) and 416.920(c)) provide that an individual who does not have a "severe impairment" will not be found to be "disabled." However, sections 404.1520(d) and 416.920(d) (20 CFR 404.1520(d) and 416.920(d)) provide that if an individual is not working and is suffering from a severe impairment which meets the duration requirement (i.e., has lasted or is expected to last for a continuous period of at least 12 months) and which "meets or equals a listed impairment in Appendix 1," a finding of "disabled" will be made without consideration of age, education, or work experience.

Claimant applied for Supplemental Security Income benefits on March 12, 1982, and for Disability Insurance Benefits on August 11, 1982. By reason of a timely request, a hearing was commenced on December 8, 1982, and continued until December 16, 1982.

Claimant was born on May 8, 1945, is a high school graduate and her last work activity was through CETA for the police department where she performed clerical duties. She worked there for three years and was laid off from the job. On March 5, 1982, claimant was admitted to the St. Vincent's Hospital Psychiatric Ward where she was hospitalized until April 8, 1982. It appeared that she was living in the street for the past two months. The hospital record indicates that she lost her job with the police department because of her psychotic behavior. She has a history of prior hospitalizations. The diagnosis was chronic paranoid schizophrenia. From there she was an outpatient to the Brooklyn Psycho-Social Rehabilitation Institute and she has been resident at the Boerum Hill resi-

dence (a residence for mental disabled individuals). She has been on stelazine since discharge from the hospital. The PsychoSocial Rehabilitation Institute psychiatrist furnishes a diagnosis of schizophrenia, chronic undifferentiated. She has been examined in psychiatric consultation on two occasions the first by Dr. Elliot Levy on May 19, 1982, who diagnosis claimant as suffering from chronic schizophrenia probably progressive deteriorating. The prognosis is poor and she is unable to function or form any meaningful relationships at the present time. Further she was unemployable. She was reexamined by Dr. J. Fiks on October 1, 1981, who also furnished a diagnosis of schizophrenia, chronic undifferentiated. He noted that she denied there was anything wrong with her. He says "I was under the impression that claimant was very much invested in denying any manifestation of mental illness and portraying herself as being like everybody else."

Claimant testified that there is nothing wrong with her. She is a resident at the Boerum Hill facility and she is attending a training program where she is being taught the use of the electric typewriter. She has no friends and spends most of her time by herself. She like to take long walks by herself. She gets along well with her parents and brothers. The hearing was continued until December 16, 1982, in order to take the testimony of claimant's counsellor.

Ms. Anne Shelly a certified social worker testified that she has known claimant as a patient at the Brooklyn Psycho-Social Rehabilitation Center (BPRI) since April, 1982, when she first came under their care. She described claimant as being seclusive. She makes no associations. Although she has been under training to learn the use of the electric typewriter, she seems to have difficulty coping with minimal pressures. It was her opinion, that claimant could not function in a stressful setting. She would quickly decompensate. Notwithstanding the testimony of the

claimant, according to Ms. Shelly, she does not get along with her mother who is herself a catatonic type of individual. Claimant has a seven year old daughter born out of wedlock whom she surrendered to her mother's custody and adoption. She has not demonstrated much affection for her daughter. Claimant is erratic in her punctuality and attendance at the training center and it was her opinion that if she were to be placed in a work setting, albeit, sedentary and unskilled that she would in a very short time, i.e., about two weeks decompensate and then commence hallucinating and manifest other paranoid ideas.

One of the features of a chronic schizophrenic individual with uncertain types of symptoms is the denial of illness as appears to be this case. It is patent that this claimant has a long history of mental illness persistently described as schizophrenia with paranoid features. It may well be that she is making some progress at this time but will not in the forseeable future be amenable to any form of vocational rehabilitation. According to Ms. Shelly, she looked forward to in the near future to being able to place claimant in vocational rehabilitation. Considering all the symptoms, the undersigned concludes that she meets the listings to the Regulations, i.e., Section 12.03(A)(6)(7) and (B). As to onset, claimant was unclear as to when she became ill. However, the St. Vincent's Hospital record shows that she was first admitted to the medical facility on February 12, from the Women's Shelter in a cyanotic febrile condition after wondering the streets for three months without money. Prior to that she had been working as a clerk for the police department but lost her job there secondary to psychotic behavior. This would therefore establish an onset of disability as described above until December 30, 1981, which the undersigned here fixes as the onset date of her disability.

Claimant testified that she is receiving public assistance.

The medical document that the claimant suffers from severe schizophrenia paranoid type impairment which meet listing 12.03(A)(6)(7) and (B). The claimant's impairment has precluded her from working since the alleged onset date of December 30, 1981. She is not engaging in substantial gainful activity. She meets the special earnings requirements of the Act for the purpose of entitlement to a period of disability and disability insurance benefits. Consequently, the claimant is considered "disabled" pursuant to 20 CFR 404.1520(d), 20 CFR 416.920(d), and section 12.03(A)(6)(7) and (B) of Subpart P, Appendix 1, Regulations No. 4.

FINDINGS

After careful consideration of the entire record, the administrative law judge makes the following findings:

1. The claimant met the special earnings requirements of the Act on December 30, 1981, the date the claimant stated she became unable to work, and continues to meet them through September 30, 1984.
2. The claimant has not engaged in substantial gainful activity since November 1, 1981.
3. The medical evidence establishes that the claimant has severe chronic schizophrenia with paranoid features.
4. The severity of the claimant's impairment meets the requirements of section 12.03(A)(6)(7) and (B). Appendix 1, Subpart P, Regulations No. 4 and has precluded her from working for at least 12 continuous months.
5. Pursuant to 20 CFR 404.1520(d) and 416.920(d) and the above findings, the claimant's impairment is disabling.

DECISION

It is the decision of the administrative law judge that, based on the application filed on August 11, 1982, the claimant is entitled to a period of disability commencing on December 30, 1981 and to disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act.

It is the further decision of the administrative law judge that, as of the date of the application for supplemental security income filed on March 12, 1982, the claimant was "disabled" as defined in section 1614(a)(3)(A) of the Social Security Act, and that the claimant's disability has continued through the date of this decision.

The component of the Social Security Administration responsible for authorizing supplemental security income payments will advise the claimant regarding the nondisability requirements for these payments, and if eligible, the amount and the month(s) for which payment will be made.

/s/ MANUEL TAXEL
Manuel Taxel
Administrative Law Judge

DATE: JANUARY 31, 1983

c. JANE DOE III
Plaintiffs' Exhibit 45

Supplemental Security Income
Notice of Disapproved Claim - Disability

From: Department of Health and Human Services
Social Security Administation
wdd 10/21/82 IV/J/20

Date: Oct 29 1982

Social Security Number:
[Deleted from Document] [Deleted from Document]
[Illegible] Transitional Services
235-61 Hillside Ave.
Jamaica, NY 11427

After a careful review of your case, we have determined that you are not eligible to receive Supplemental Security Income payments under the provisions of title XVI of the Social Security Act. Attached to this notice is an explanation of the decision we made in your claim and how we arrived at it.

The evidence shows that you do not meet either the blindness or disability requirements for Supplemental Security Income payments. To get Supplemental Security Income checks because of disability, you must be unable to work due to a medical condition which has lasted or will last at least 12 months in a row. The impairment must be so severe as to keep you from working not only at your usual job but in any other substantial gainful work considering your age, education, training, and work experience. After carefully studying your records, including the medical evidence and your statements, and considering your age, education, training and experience, it has been determined that your condition is not disabling and you do not meet the disability requirements for eligibility.

The disability/blindness decision in your case was made by the Social Security Administration (*not your personal physician)* on the basis of a determination by an agency of the State in which you live. Physicians and other trained disability evaluation personnel in the State agency participate in making such determinations.

If your condition gets worse, you may file a new application for Supplemental Security Income payments.

If at any time in the future you think you qualify for payment, please contact us immediately about filing a new application. We cannot make payment for any month before the month in which you apply.

This decision refers only to your claim for Supplemental Security Income payments. If you also filed a claim for Social Security payments, a decision on that claim will be sent to you in a seperate notice.

Enclosure:
SSA Publication No. 05-11008

Important: See other side for an explanation of your appeal rights and other information.

Form SSA-L1131-U2 (8-80)

[Illegible] HUMAN SERVICES
wdd 10/20/82 IV/J/20
FORM SSA - 4268 - US (8-80)

EXPLANATION OF DETERMINATION

Claimant	
[Illegible]	SSN
[Deleted from Document]	[Deleted from Document

The determination on your claim was made by an agency of the State and not by the individuals or agencies who submitted reports. The evidence used to decide your claim was obtained from Queens Hospital, period covering 12/15/81 to 9/7/82; Boots Memorial Hospital, period covering 1/28/80 to 2/12/80. We did not obtain any other reports because this gave us enough information. You said you were disabled because of an emotional problem. The medical evidence shows that you have had some difficulty in stressful situations and the ability to care for your needs. Since you were treated, your condition has been controlled.

We realize that your condition prevents you from returning to your usual job, however, there are many other jobs that you can do.

Department of Health and Human Services
Social Security Administation

(2, 416, 841) Par. No. 800B(8/81)

Supplemental Security Income
Notice of Reconsideration - Disability

From: Department of Health and Human Services
Social Security Administration

12-3-82
Date: Dec 8 1982

[Deleted from Document]

c/o Transitional Services
235 61 Hillside Ave
Jamaica, NY 11427

Social Security Number:
[Deleted from Document]
Reconsideration Filed:

Upon receipt of your request for reconsideration we had your claim independently reviewed by a physician and disability examiner in the State agency which works with us in making disablity determinations. The evidence in your case has been thoroughly evaluated; this includes the medical evidence and the additional information received since the original decision. We find that the previous determination denying your claim was proper under the law. Attached to this notice is an explanation of the decision we made in your claim and how we arrived at it.

If you believe that the reconsideration determination is not correct, you may request a hearing before an administrative law judge of the Office of Hearings and Appeals. If you want a hearing, you must request it not later than 60 days from the date you receive this notice. You may make your request through any social sercurity office. Read the enclosed leaflet and the reverse side of this notice for a full explanation of your right to appeal.

Please get in touch with social security if you believe this decision is wrong or you have any questions or need more information. Most questions can be handled by phoning

or writing any social security office. If you visit a social security office, please this notice with you. If the decision in you case is based on incorrect information, we'll be happy to make whatever change is necessary.

Enclosure:
SSA Pub. No. 70-10281

Important: See other side for an explanation of your appeal rights and other information

Form SSA-L1130-U2(8-80)

EXPLANATION OF DETERMINATION

Name of Claimant SSN
[Deleted from Document] [Deleted from Document]

The determination on your claim was made by an agency of the State and not by the individuals or agencies who submitted reports. The evidence used to decide your claim was obtained from Queens Hospital Center repot covering 12-81 to 9-82 and Booth Memorial Hospital report covering 1-80 to 2-80. We did not obtain any other reports because this gave us enough information. You said you were disabled because of an emotional problem. The medical evidence shows that you have had some difficulty in stressful situations and the ability to care for your needs. We realize you are unable to perform certain kinds of work. However, you are able to perform A job in which you would have simple tasks.

We realize that your condition prevents you from returning to your usual job, however, there are many other jobs that you can do.

Department of Health and Human Services
Social Security Administration

(2, 416, 841) Par. No. 8005(8/81)

d. RICHARD ROE I
Plaintiffs' Exhibit 46

Supplemental Security Income
Notice of Disapproved Claim – Disability

From: Department of Health and Human Services
Social Security Administration
wam 12/30/82 II-C-5

Date: Jan 04
Social Security Number:
[Deleted from Document] [Deleted from Document]
50 Nevins St.
Brooklyn, NY 11217

After a careful review of your case, we have determined that you are not eligible to receive Supplemental Security Income payments under the provisions of title XVI of the Social Security Act. Attached to this notice is an explanation of the decision we made in your claim and how we arrived at it.

The evidence shows that you do not meet either the blindness or disability requirements for Supplemental Security Income payments. To get Supplemental Security Income checks because of disability, you must be unable to work due to a medical condition which has lasted or will last at least 12 months in a row. The impairment must be so severe as to keep you from working not only at your usual job but in any other substantial gainful work considering your age, education, training, and work experience. After carefully studying your records, including the medical evidence and your statements, and considering your age, education, training and experience, it had been determined that your condition is not disabling and you do not meet the disability requirements for eligibility.

The disability/blindness decision in your case was made by the Social Security Administration (*not your personal*

physician) on the basis of a determination by an agency of the State in which you live. Physicians and other trained disability evaluation personnel in the State agency participate in making such determinations.

If your condition gets worse, you may file a new application for Supplemental Security Income payments.

If at any time in the future you think you qualify for payment, please contact us immediately about filing a new application. We cannot make payment for any month before the month in which you apply.

This decision refers only to your claim for Supplemental Security Income payments. If you also filed a claim for Social Security payments, a decision on that claim will be sent to you in a separate notice.

Enclosure:
SSA Publication No. 05-11008

Important: See other side for an explanation of your appeal rights and other information.

Form SSA-L1131-U2 (8-80)

DEPT OF HEALTH AND HUMAN SERVICES
Social Security Administration
[Illegible] 12/30/82 II/C/5

DISABILITY DETERMINATION RATIONALE

Name of Claimant	SSN
[Deleted from Document]	[Deleted from Document]

The determination on your claim was made by an agency of the State and not by the individuals or agencies who submitted reports. The evidence used to decide your claim was obtained from Karl Easton, M.D., report of 12/15/82 and Kings County Hosp., report of 1/16/81. We did not obtain any other reports because no others were available. You said you were disabled because of an emotional problem. The medical evidence shows that you have had some difficulty in stressful situations. We realize you are unable to perform certain kinds of work. However, you are able to perform a job in which you would have simple tasks.

We realize that your condition prevents you from returning to your usual job, however, there are many other jobs that you can do.

WE's Name (If CDB or DWB Claim)	Type of Claim		(Initial and Date)
Disability Examiner DDS / Date	Review Physician DDS / Date		
Disability Examiner SSA / Date	Disability Examiner SSA / Date		

FORM SSA-4268-U4 (8-80)

1. FOLDER COPY

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

[Deleted from Document]

DECISION

In the case of	Claim for
[Deleted from Document] (Claimant)	Period of Disability, Disability Insurance Benefits and Supplemental Security Income
(Wage Earner) (Leave blank) if same as above)	[Deleted from Document (Social Security Number)

This case is before the undersigned Administrative Law Judge upon a timely request for hearing.

JURISDICTIONAL SUMMARY

The claimant filed his current application for Supplemental Security Income under Title XVI of the Social Security Act on March 16, 1981. (Exhibit #6). That claim having been denied initially, he filed a request for reconsideration on September 25, 1981 (Exhibit #2). On the same date, he also filed an application for a Period of Disability and Disability Insurance Benefits under Title II of the Social Security Act, which application was raised to the reconsideration level to be determined along with the Supplemental Security Income claim (Exhibit #1). Both claims

were denied at the reconsideration level. Claimant timely request a hearing on November 20, 1981, and a hearing was held before the undersigned on March 9, 1982.

The initial determination under Title XVI of the Act and both reconsideration determinations under Titles II and XVI were based upon findings that the claimant was not disabled within the meaning of the Social Security Act. However, prior to the issuance of the reconsideration determinations, the claimant informed the Social Security Administration that he owned land in Maryland which was of sufficient value as to render him ineligible for Supplemental Security Income as a result of excess resources (Exhibit #17). The Social Security District Office attempted to obtain proof of ownership of this property but was unsuccessful; nonetheless, as a result of their development, the Administration concluded that the claimant did indeed have resources in excess of the amount allowed by law and determined that, regardless of any disability determination, claimant would not be entitled to Supplemental Security Income. They, therefore, recommend that the undersigned dismiss the claim for benefits under Title XVI of the Act (Exhibit 427).

[Illegible]
[Illegible] CLAIM FILE

As pertinent, Regulation 416.1446 of the Social Security Regulations Part 416 provides that an Administrative Law Judge shall consider all of the issues brought out in the initial or reconsidered determinations that were not decided entirely in a claimant's favor. An Administrative Law Judge may also consider new issues which were not decided at the initial or reconsideration level but only provided that he notifies the claimant prior to the hearing that such consideration will be made. In the case at hand, the basis of both the initial and reconsidered determinations under Title XVI of the Act was whether or not the claimant was disabled. Therefore, the undersigned is bound to consider this issue at the hearing level under the mandate of Section 416.1446 of the Regulations. Furthermore, claimant was not sent a notice advising him that the issue of his eligibility for Supplemental Security Income under the provisions of Section 1611(a)(1)(B) of the Social Security Act would be considered. Thus, that issue is not properly before the undersigned for consideration, especially in view of the fact that claimant did not have an opportunity to exhaust his administrative remedies with respect thereto. Finally, aside from the foregoing reasons dismissal would be inappropriate in this case since Section 416.1457 of the Social Security Regulations Part 416 specifies certain instances under which dismissal may be made and this claim does not fall within the requirements of any of those situations.

ISSUES

Accordingly, the issues to be decided by the undersigned are whether the claimant is entitled to a period of disability under section 216(i), and to disability insurance benefits

under section 223, and is eligible for supplemental security income under section 1614(a)(3)(A) of the Social Security Act, as amended. The specific issues are whether the claimant was under a "disability," as defined in the Act and, if so, when such "disability" commenced and the duration thereof; and whether the special earnings requirements under Title II of the Act are met for the purpose of entitlement.

LAW AND REGULATIONS

Section 216(i) of the Social Security Act provides for the establishment of a period of disability, and section 223 of the Act provides for the payment of disability insurance benefits where the requirements specified therein are met.

Sections 223(d)(1) and 1614(a)(3)(A) of the Social Security Act define disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."

EVIDENCE CONSIDERED

In arriving at this decision, the undersigned Administrative Law Judge has carefully considered all of the evidence of record, including the claimant's testimony at his hearing and the documents described in the List of Exhibits attached hereto.

SUMMARY AND EVALUATION OF THE EVIDENCE

Pursuant to the aforementioned timely hearing request, a hearing was held before the undersigned on March 9, 1982. The claimant appeared on that date and testified *pro se*, choosing to waive his right to legal representation. However, also appearing on his behalf was Ms. Sharon Harley, a counselor at the Boerum Hill Residence at which claimant currently resides.

The claimant was born on April 27, 1950 and is, therefore, thirty-two years old. Although he once stated that he was a high school graduate (Exhibit #18), he has since changed his testimony on several occasions to indicate that he actually dropped out of high school in his twelfth year. He has worked at several jobs for brief periods throughout his working career, including as a shipping clerk, a security guard, a truck driver and a construction worker. He last worked steadily in 1976 and unsuccessfully tried to return to work as a security guard between October, 1980, and December 28, 1980 (Exhibit #13).

The medical evidence of record establishes beyond question that the claimant is currently disabled within the meaning of the Social Security Act as a result of a psychiatric disorder. The earliest evidence in file shows that the claimant was admitted to the Kings County

Hospital on January 14, 1981, and transferred to the Kingsboro Pyschiatric Center on January 16, 1981, with a diagnosis of schizophrenia, chronic undifferentiated type. The record is unclear as to his discharge date except to show that he was still hospitalized on March 16, 1981. He was apparently discharged shortly thereafter and his attending physician at the hospital reported that when last seen on March 13, 1981, he exhibited good reality testing with good insight and judgment and ability to conduct his own affairs (Exhibits #18 and 19). This recovery was short lived, however, as demonstrated by subsequent records for the remainder of 1981. Claimant was readmitted to Kings County Hospital on June 2, 1981, when he attempted suicide by overdose of his antipsychotic medication. He responded relatively rapidly to treatment while hospitalized and was discharged on June 30, 1981, in remission (Exhibit #20). However, only about five weeks later, on August 7, 1981, claimant was again admitted to the psychiatric section of the Kings County Hospital in an acutely psychotic state. (Exhibits #22 and 25). He was not discharged until September 23, 1981, when he took up residence at the Boerum Hill Rehabilitation Home, a community residence for individuals such as the claimant who are not fully recovered and require some supervision of their daily activities. Claimant was examined in consul-

tation at the request of the Administration by a Dr. Yodashkin on October 29, 1981. Although he was clearly in remission, it was only partial: He continued to manifest symptomatology of mild irrationality, slightly inappropriate affect, lack of insight, and mildly impaired judgment which was felt to be satisfactory enough for him to live in an adult home with some supervision. The doctor concluded that the claimant continued to suffer from chronic schizophrenia and that "at this time employment does not seem likely for him; however, with his enthusiam it is possible in the far distant future that he would be able to be in competitive industry." (Exhibit #23). Somewhat later, on January 22, 1982, the claimant's therapist and psychiatrist at the Boerum Hill Residence reported that he had once again begun expressing suicidal ideations, that he was clearly depressed and that the theme of hurting himself was recurrent. He was reportedly often tangential and labile and it was felt that he might require further hospitalization (Exhibit #26).

In considering this evidence as a totality, the undersigned finds a clear, consistent picture of severely impaired functioning and only marginal control of the claimant's condition despite high dosages of Thorazine. Certainly, the claimant was disabled throughout 1981, especially since his three psychiatric hospitalizations kept him confined for approximately seven of the twelve months of the year. Based upon the report of his treating psychiatrist (Exhibit #26) it appears that he has yet to be stabilized satisfactorily and that Dr. Yodashkin's impression that claimant would not be employable until the "far distant future" is an accurate description of the claimant's capacity for work. Thus, the undersigned concludes that the claimant has been unable to engage in any form of substantial gainful activity since January 14, 1981, the

date of his earliest documented admission to Kings County Hospital. In arriving at this decision, the undersigned has considered a statement of Residual Functional Capacity opined by a review physician of the New York State Bureau of Disability Determinations on November 6, 1981, (Exhibit #24) and finds it to be wholly inconsistent with the psychiatric evidence of record.

Although the claimant is currently disabled, he is not entitled to benefits under Title II of the Social Security. Review of his earnings record shows that he last met the special insured status requirements for entitlement to a Period of Disability and Disability Insurance Benefits on March 31, 1980 (Exhibit #12). Consequently, in order to establish entitlement to a Period of Disability and Disability Insurance Benefits the claimant must establish that his disability commenced on or before March 31, 1980. The evidence of record extends back only to January 14, 1981, well beyond claimant's date last insured. Moreover, although claimant apparently had been hospitalized on at least two occasions prior to the hospitalization of January, 1981, these hospitalizations fell well before his date last insured at times when he was subsequently able to return to work and therefore are not indicative of any disabling condition during the period at issue. Between 1978 and January, 1981, the claimant was not hospitalized nor did he receive any significant psychiatric treatment. For all these reasons, the undersigned determines that the claim-

ant has failed to establish the existence of a disability which began on or before his date last insured and concludes that it is unlikely that any evidence exists which might establish such disability. Accordingly, the undersigned must deny the claim under Title II of the Social Security Act.

As stated at the outset of this decision, it appears that the claimant has failed to meet one of the basic eligibility requirements for entitlement to Supplemental Security Income, i.e., the resource limitations set forth in Section 1602 of the Act. Since this is not a matter before this court, suffice it to say that the claimant has been determined to be disabled commencing in January, 1981. He will not, however, be entitled to receive Supplemental Security Income Benefits unless he can satisfactorily resolve the issue of his eligibility under the nondisability provisions of the Act.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following specific findings:

1. The claimant met the special earnings requirements of the Act on August 15, 1978, the date that he stated he became unable to work, and continued to meet them through March 31, 1980, but not thereafter.

2. The medical evidence of record shows that the claimant suffers from schizophrenia, chronic undifferentiated type.

3. The substantial medical evidence of record establishes conclusively that since January 14, 1981, the claimant has been under a "disability," as defined in the Social Security Act, as amended.

4. However, there is no evidence to establish an earlier onset of disability or to demonstrate that the claimant became disabled on or before March 31, 1980.

5. Therefore, since the claimant was not under any "disability" which began on or before his date last insured, he is not entitled to a Period of Disability or Disability Insurance Benefits under Title II of the Social Security Act, as amended.

6. For purposes of eligibility for Supplemental Security Income, the claimant has been disabled since January 14, 1981.

7. However, there is a question as to whether or not claimant meets certain non-disability eligibility requirements of Title XVI of the Act, specifically, whether his resources exceed the limits allowed by law. This decision makes no finding with respect to that issue, which must be appealed through the normal administrative channels.

DECISION

It is the decision of the undersigned Administrative Law Judge that, based upon the application filed on March 16, 1981, the claimant has been disabled within the meaning of Section 1614 of the Social Security Act, as amended, since January 14, 1981. However, his entitlement to Supplemental Security Income is dependent upon further investigation by the Social Security Administration as to whether or not he meets all of the remaining eligibility criteria for entitlement to such benefits under Title XVI of the Act.

It is further the decision of the undersigned Administrative Law Judge that, based upon the application filed on September 26, 1981, the claimant is not entitled to a Period of Disability or Disability Insurance Benefits under Sections 216(i) and 223, respectively, of the Social Security Act, as amended.

MANUEL TAXEL
ADMINISTRATIVE LAW
JUDGE

DATE: June 28, 1982

e. RICHARD ROE II
Plaintiffs' Exhibit 47
(Notice of initial decision and reconsideration determination)

Supplemental Security Income
Notice of Disapproved Claim – Disability

From: Department of Health and Human Services
Social Security Administration
wt.1 9/16/82 IV-3-20

Date: SEP 28 1982

[Deleted from Document]
37-10 114 Street
Corona, NY 11368

Social Security Number
[Deleted from Document]

After a careful review of your case, we have determined that you are not eligible to receive Supplemental Security Income payments under the provisions of title XVI of the Social Security Act. Attached to this notice is an explanation of the decision we made in your claim and how we arrived at it.

The evidence shows that you do not meet either the blindness or disability requirements for Supplemental Security Income payments. To get Supplemental Security Income checks because of disability, you must be unable to work due to a medical condition which has lasted or will last at least 12 months in a row. The impairment must be so severe as to keep you from working not only at your usual job but in any other substantial gainful work considering your age, education, training, and work experience. After carefully studying your records, including the medical evidence and your statements, and considering your age, education, training and experience, it has been determined that your condition is not disabling and you do not meet the disability requirements for eligibility.

The disability/blindness decision in your case was made by the Social Security Administration (*not your personal/physician*) on the basis of a determination by an agency of the State in which you live. Physicians and other trained disability evaluation personnel in the State agency participate in making such determinations.

If your condition get worse, you may file a new application for Supplemental Security Income payments.

If at any time in the future you think you qualify for payment, please contact us immediately about filing a new application. We cannot make payment for any month before the month in which you apply.

This decision refers only to your claim for Supplemental Security Income payments. If you also filed a claim for Social Security payments, a decision on that claim will be sent to you in a separate notice.

Enclosure:
SSA Publication No. 05-11008

Important: See other side for an explanation of your appeal rights and other information.

Supplemental Security Income
Notice of Reconsideration – Disability

From: Department of Health and Human Services
Social Security Administration
wdg 11/4/82 IV-J-R10

Date: NOV 10 1982

[Deleted from Document]
235 61 Hillside Ave.
Queens Village, NY 11427

Social Security Number:
[Deleted from Docucment]
Reconsidered Filed:

Upon receipt of your request for reconsideration we had your claim independently reviewed by a physician and disability examiner in the State agency which works with us in making disability determinations. The evidence in your case has been thoroughly evaluated: this includes the medical evidence and the additional information received since the original decision. We find that the previous determination denying your claim was proper under the law. Attached to this notice is an explanation of the decision we made in your claim and how we arrived at it.

If you believe that the reconsideration determination is not correct, you may request a hearing before an administrative law judge of the Office of Hearings and Appeals. If you want a hearing, you must request it not later than 60 days from the date you receive this notice. You may make your request through and social security office. Read the enclosed leaflet and the reverse side of this notice for a full explanation of your right of appeal.

Please get in touch with social security if you believe this decision is wrong or you have any questions or need more information. Most questions can be handled by phoning or writing any social security office. If you visit a social security office, please bring this notice with you. If the decision in your case is based on incorrect information, we'll be happy to make whatever change is necessary.

Enclosure:
SSA Pub. No. 70-10281

Important: See other side for an explanation of your appeal rights and other information

Form SSA-L1130-U2 (8-80)

DEPT OF HEALTH AND HUMAN SERVICES
Social Security Administration
wdg 11/4/82 IV-J-R10 FORM SSA 4268 [Illegible]

EXPLANATION OF DETERMINATION

Name of Claimant	[Deleted from Document]
[Deleted from Document]	[Deleted from Document]

The determination on your claim was made by an agency of the State and not by the individuals or agencies who submitted reports. The evidence used to decide your claim was obtained from B. Fineson Developmental Center, reports of 8/19/82 and 3/22/82 and D. Puro, MD, report of 3/9/82. We did not obtain any other reports because this gave us enough information. You said you were disabled because of a mental disorder and seizures. The medical evidence shows that you have had an emotional disorder. Since you were treated, your condition has stabilized. We realize you are unable to perform certain kinds of work. However, you are able to perform a job in which you would not have to drive or operate machinery, and would not be exposed to dangerous conditions, a job in which you would not work closely with other people and a job in which you would have simple tasks.

Although you have had no recent work experience, there are many jobs requiring little or no training that you can do.

(2, 416, 841) Par. No. 800B(8/81)
Department of Health and Human Services
Social Security Administration

Social Security
Notice of Reconsideration

From: Department of Health and Human Services
Social Security Administration
wdg 11/8/82 IV-J-R10 [Illegible]

Date: NOV 10 1982

Claim Number
[Deleted from Document]

[Deleted from Document]
235-61 Hillside Ave.
Queens Village, NY 11427

Claim for

- ☐ Disability Insurance Benefits
- ☐ Disabled Widow, Widower Benefits
- ☐ Childhood Disability Benefits

Upon receipt of your request for consideration we had your claim independently reviewed by a physician and disability examiner in the State agency which works with us in making disability determinations. The evidence in your case has been thoroughly evaluated; this includes the medical evidence and the additional information received since the original decision. We find that the previous determination denying your claim was proper under the law. The reverse of this notice identifies the legal requirements for your type of claim.

If you believe that the reconsideration determination is not correct, you may request a hearing before an administrative law judge of the Office of Hearings and Appeals. If you want a hearing, you must request it not later than 60 days from the date you receive this notice. You may make your request through any social security office. Read the enclosed leaflet for a full explanation of your right to appeal.

If you do not request a hearing of your case within the prescribed time period, you still have the right to file another application at any time.

If you have questions about your claim, you should get in touch with any social security office. Most questions can be handled by telephone or mail. If you visit an office, however, please take this letter with you.

Enclosure:
SSA Pub. No. 70-10282

Important: See other side for additional information

Form SSA-L928-U2(8-80)
Prior editions may be used until supply is exhausted

Defendants' Exhibit L
(Administrative Law Judge's decision
dated April 29, 1983;
Appeals Councils dated June 8, 1983;
Appeals Council's Order dated October 6, 1983)

DEPARTMENT OF HEALTH & HUMAN SERVICES
Social Security Administration

Refer to: OFFICE OF HEARINGS AND APPEALS

Name and Address of Claimant:
[Deleted from Document]
235-61 Hillside Avenue
Jamaica, N.Y. 11427

NOTICE OF DECISION – DENIAL
PLEASE READ CAREFULLY

If you disagree, in whole or in part, with the enclosed decision you may request the Appeal Council to review it. However, your request for review must be filed within 60 days after the date of receipt of this notice. It will be presumed that this notice is received within 5 days after the date shown below, unless a reasonable showing is made otherwise.

If you wish to request review, you (or your representative) should file the request at your local social security office. The people there will supply you with a request for review form and will be glad to assist you in completing the form. However, if you prefer, you may file your request for review at the hearing office or by sending a letter, requesting review, directly to the Appeals Council, Office of Hearings and Appeals, P.O. Box 2518, Washington, D.C. 20013.

Unless you file a timely request for review by the Appeals Council, you may not obtain a court review of your case under section 205(g), 1631(c)(3), or 1869(b) of the Social Security Act.

This notice and enclosed copy of hearing decision mailed

April 29, 1983

cc:
Name and Address of Representative:

Miles Mims, Counselor at Transitional Services
235-61 Hillside Avenue
Jamaica, N.Y. 11427

Form HA-L5023-U6(379) (Formerly HA-502.3)

HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

DECISION

In the case of	Claim for Period of Disability, Disability Insurance Benefits and Supplemental Security Income
[Deleted from Document] (Claimant)	
(Wage Earner) (Leave blank if same as above)	[Deleted from Document] (Social Security Number)

This case is before the Administartive Law Judge on a request for hearing. The Administrative Law Judge has carefully considered all the documents identified in the record as exhibits, the testimony at the hearing and arguments presented.

ISSUES

The general issues are whether the claimant is entitled to a period of disabiltiy and disability insurance benefits under section 216(i) and 223, respectively, of the Social Security Act, as amended; and whether the claimant is disabled under section 1614(a)(3)(A) of the Act. The Social Security Act defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairment(s) which can be expected to either result in death or last for a continuous period of not less than 12 months.

The specific issues are whether the claimant was under a "disability" and, if so, when such disability commenced and the duration thereof; and whether the special earnings

Unless you file a timely request for review by the Appeals Council, you may not obtain a court review of your case under section 205(g), 1631(c)(3), or 1869(b) of the Social Security Act.

This notice and enclosed copy of hearing decision mailed

April 29, 1983

cc:
Name and Address of Representative:

Miles Mims, Counselor at Transitional Services
235-61 Hillside Avenue
Jamaica, N.Y. 11427

Form HA-L5023-U6(379) (Formerly HA-502.3)

HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

DECISION

In the case of	Claim for Period of Disability, Disability Insurance Benefits and Supplemental Security Income
[Deleted from Document] (Claimant)	
(Wage Earner) (Leave blank if same as above)	[Deleted from Document] (Social Security Number)

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The general issues are whether the claimant is entitled to a period of disabiltiy and disability insurance benefits under section 216(i) and 223, respectively, of the Social Security Act, as amended; and whether the claimant is disabled under section 1614(a)(3)(A) of the Act. The Social Security Act defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairment(s) which can be expected to either result in death or last for a continuous period of not less than 12 months.

The specific issues are whether the claimant was under a "disability" and, if so, when such disability commenced and the duration thereof; and whether the special earnings

requirements of the Act are met for the purpose of entitlement to a period of disability and disability insurance benefits.

APPLICABLE REGULATION AND EVALUATION OF THE EVIDENCE

Pursuant to the Act, the Secretary has established Regulations No. 4 and No. 16. The Regulations provide steps for evaluating disability (20 CFR 404.1520(a) and 416.920(a)). In addition, a claimant's impairment must meet the 12 month duration requirement before being found disabling. A set order is followed to determine whether an individual is disabled. If it is determined that a claimant is or is not disabled at any point in the review, further review is not necessary.

[First line illegible]
Administrative Law Judge to consider the following in sequence:

1. An individual who is working and engaging in substantial gainful avtivity will not be found to be "disabled" regardless of medical findings (20 CFR 404.1520(b) and 416.920(b));
2. An individual who does not have a "severe impairment" will not be found to be "disabled" (20 CFR 404.1520(c) and 416.920(c));
3. If an individual is not working and is suffering from a severe impairment which meets the duration requirement and which "meets or equals a listed impairment in Appendix 1" of Subpart P of Regulations No. 4, a findings of "disabled" will be made without consideration of vocational factors (20 CFR 404.1520(d) and 416.920(d));
4. If an individual is capable of performing work he or she has done in the past, a finding of "not disabled," must be made (20 CFR 404.1520(e) and 416.920(e));
5. If an individual's impairment is so severe as to preclude the performance of past work, other factors including age, education, past work experience and residual functional capacity must be considered to determine if other work can be performed (20 CFR 404.1520(f) and 416.920(f)).

The rules set out in Appendix 2 of Subpart P of Regulations No. 4 will be considered in determining whether a claimant with exertional impairments is or is not disabled. The regulations also provide that if an individual suffers from a nonexertional impairment as well as an exertional impairment, both are considered in determining residual functional capacity (20 CFR 404.1545 and 416.945). The rules established in Appendix 2 are then used as a framework in evaluating "disability," if a finding of

disabled cannot be made based on strength limitations alone. In cases where the individual has solely a nonexertional type of impairment, determination as to whether disability exists shall be based on the principles in the appropriate sections of the regulations, giving consideration to the rules for specific case situations in Appendix 2.

EVALUATION OF THE EVIDENCE

Claimant applied for a period of disability, Disability Insurance Benefits (Exhibit 1) and Supplemental Security Income Benefits (Exhibit 5) based on a mental impairment alleged to be disabling as of August 1, 1975. Having been denied initially (Exhibit 6) and on reconsideration (Exhibits 3 and 8), claimant requested a formal hearing (Exhibit 10), which was held in Jamaica, New York with claimant attending, represented by Miles Mims, a counselor at Transitional Services, and accompanied by Marguerite Murphy, Human Resources Coordinator. Claimant was advised of his right to legal assistance.

TESTIMONY

Claimant testified that he was 39 years old, having been born July 24, 1943, single, living at Transitional Services, travelled to hearing by car although he rides public transportation by himself. He lives with a roommate; manages to clean his quarters and is being taught how to prepare food. He had lived there since July 1982 and was at Bernard Fineson Devleopment Center for retarded persons prior to that from November 1981 to July 1982. He had also previously lived in a rooming house with a roommate.

Claimant has a diploma from a vocational high school and a year's experience in 1968 in operating bakery machinery, specifically, on a conveyor belt to make sure baked goods were running along on it smoothly. He was fired when he suffered a grand mal seizure. Since 1968 he said he has not worked. Claimant's Vocational Report indicates that from 1973 to 1974 claimant was a clerk/messenger, from 1975 to 1981 intermittently he worked as a messenger and thereafter to date he worked in a sheltered workshop, and also did some volunteer work. He alleged he had been sick since age three. In September 1982 he alleged two seizures. Even though claimant was on medication, he suffered a grand mal in December 1982 for which he was hospitalized. However, he has not had another such seizure in five years, although he gave a history of several prior hospitalizations.

In addition to seizures, claimant cites depression because he has no family or friends, and is lonely. He denies hearing voices, but at his volunteer jobs he makes mistakes xeroxing originals and forgets where he leaves things. He has no physical impairments, and travels about by himself. He watches television, goes to the movies and generally gets along with his roommate.

Miles Mins, claimant's counselor, testified that claimant is able to control his anger with Prolixin and can be maintained in a work setting with it. The counselor contradicted claimant and suggested the latter took two hours to make a 20 minute trip. He futher noted that claimant could not distinguish between friendships and a relationship, as he attempted to fondle and touch the female resident and counselors at the program. The counselor stated that claimant is taught skills, cooking and budgeting but the latter was not functioning well at these and even exhibited dangerous behavior in the kitchen such as leaving meat in the oven too long starting a grease fire. Claimant manifested his depression in such ways as talking to himself, not sitting still, hostile verbalizations, pacing, anger and agitation. Claimant was said to be unfit for Phase II of the program' Phase I still provides direct supervison which he requires. It was noted that small jobs seem to bore him. His math level was third grade, reading was normal, comprehension minimal and IQ of 80 in the dull normal range.

Mrs. Murphy testified that claimant could not handle money, reacts to authority and was a borderline case living with four other similar borderline clients. She stated that claimant would have to drive a car to obtain a messenger's job at the present time since she felt that was a requirement for that kind of employment.

EVIDENCE

The social worker at the Bernard Fineson Center reported in March 1982 that claimant had been and was still being seen since September 30, 1981 on a voluntary admission. Prior hospitalizations were noted for August 1971 and March 1972 to July 1972. Claimant was diagnosed borderline personality disorder, borderline mental retardation, and epilepsy, grand mal type. Claimant was said to suffer extreme mood swings, display compulsive

and rigid behavior, but was considered aware of his immediate environments and functioning adequately. Claimant was said to be possessed of all of his self help and some community living skills; he enjoyed working but agrumentativeness precluded his effectiveness. He requires direction and cannot handle money. Claimant would be friendly and cooperative at times but preferred to do activities on his own. He has problems forming relationships and berates staff when he cannot get his way. Claimant was considered capable of holding a job but with professional guidance (Exhibit 17).

An administration medical questionaire completed March 26, 1982 indicated claimant had dull borderline mental retardation, secondary to encephalitis; claimant was noted as capable of recognizing bills and coins but had no concept of value and budgeting (Exhibit 18).

By August 27, 1982, the doctors at the Fineson Center diagnosed schizophrenia, in remission; he was felt to be borderline retardation and also had psychiatric disease. On medication, claimant was noted as suffering no seizures; he does go through mood swings, but "as long as someone reminds him of appropriate behavior he will remember". Claimant's judgment was rated poor, rendering him unfit to handle his own funds. His speech is clear, thought organization adequate as to simple thoughts, and thought content good at a simple level. Mood swings were cited and day-to-day living was overwhelming; Claimant is oriented to time, place and person is not delusional nor hallucinating. (Exhibit 17, pages 1 and 2).

A letter dated February 1, 1983 from Transitional Services revealed claimant was a current participant in the volunteer Personal Adjustment Training program. He was adjudged an "extremely doubtful" candidate for competitive employment within the next 12 months (Exhibit 20).

On February 2, 1983, claimant's psychiatrist at the Fineson Center reported claimant had a seizure disorder being treated with Mysoline and Tegretol. He was said to be functioning at a borderline intelligence level. Prolixin presently controls his symptoms. Claimant was diagnosed chronic undifferentiated schizophrenia in partial remission, seizure disorder, and borderline mental retardation, with prognosis guarded. (Exhibit 21).

A letter dated February 2, 1983 from Miles Mims at Transitional Services verified the information conveyed above. Claimant was said to function in the dull normal range of intelligence and suffers from epilepsy, grand mal type with periods of unconsciousness. Work environments were deemed too much for claimant to handle, especially in view of his maladaptive behavior.

EVALUATION

Every document of an evidentiary nature contained in the record has been carefully examined. Only those that are relevant to the decision herein, however, will be referred to.

Claimant has a seizure disorder which is under control with medication; he testified he has had no recent attacks. (Exhibits 17 and 21). Similarly, medication appears to mitigate his depression swings, low tolerance, and quickness to anger; moreover, one psychiatrist indicated that even though displaying maladaptive behavior, when reminded of appropriate behavior, claimant would remember such and act accordingly. There is no medical evidence of sexual problems to suggest that his alleged behavior toward females was a significant problem. (Exhibit 17). Claimant's schizophrenia was considered in remission. (Exhibit 17 and 21). Claimant's intellectual functioning was measured to be dull normal range, and he did have trouble with financial matters (Exhibits 17 and 18). In addition, claimant's testimony would suggest his impairments are not restrictions on basic work related functions and he was seen to be motivated toward making friends (Exhibit 17). At the hearing, claimant appeared coherent, logical, expressed himself well; aside from requiring a bit of supervision, adequate treatment with medication and therapy would seem to allow claimant to engage in substantial gainful activity. Claimant travels alone even if slowly and gets along with his roommate. Claimant does not have any severe impairment or combination of impairment.

In applying the sequential steps outlined above, the Administrative Law Judge concludes that a decision on whether the claimant is disabled cannot be made based on work activity. After considering the medical facts alone, the Administrative Law Judge further concludes that the claimant does not have any impairment(s) which significantly limits his physical or mental ability to do basic work activity. Consequently, it must be found that the claiment does not have a severe impairment and therefore, is not disabled within the meaning of the Social Security Act.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the followint findings:

1. The claimant met the special earnings requirements of the Act on August 1, 1975, the date the claimant stated he became unable to work, and continues to meet them through the date of this decision.
2. The claimant has not engaged in substantial gainful activity since August 1, 1975.
3. The claimant has the following impairment(s): seizure disorder controlled with medication; schizophrenia in remission; dull normal intellectual functioning.
4. The claimant's subjective complaints are not credible and unsupported by the medical evidence.

5. The claimant does not have any impairment or impairments which significantly limit his ability to perform basic work-related functions; therefore, the claimant does not have a severe impairment (20 CFR 404.1521 and 416.921).
6. The claimant was not under a "disability" as defined in the Social Security Act, at any time through the date of this decision (20 CFR 404.1520(c) and 416.920(c)).

DECISION

It is the decision of the Administrative Law Judge that, based upon the applications filed on November 4, 1982 and May 13, 1982, the claimant is not entitled to a period of disability or disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, and is not eligible for supplemental security income under sections 1602 and 1614(a)(3)(A) of the Act.

/s/ MARILYN P. HOPPENFELD

Marilyn P. Hoppenfeld
Administrative Law Judge

April 29,1983

Date

DEPARTMENT OF HEALTH & HUMAN SERVICES
Social Security Administration

June 8, 1983

Refer to:
SGC
[Deleted from Document]

Office of Hearings and Appeals
PO Box 2518
Washington DC 20013

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

[Deleted from Document]
235-61 Hillside Ave.
Jamaica, NY 11427

Dear Mr. Sommer:

The request for review of the hearing decision in your case has been considered. Section 404.970 of Social Security Administration Regulations No. 4 (20 CFR 404.970) provides that the Appeals Council will grant a request for review of a hearing decision where: (1) there appears to be an abuse of discretion by the administrative law judge; (2) there is an error of law; (3) the administrative law judge's action, findings, or conclusions are not supported by

substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest.

The Appeals Council has concluded that there is no basis under the above regulations for granting the request for review. Accordingly your request is denied and the hearing decision stands as the final decision of the Secretary in your case.

If you desire a court review of the hearing decision, you may commence a civil action in the district court of the United States in the judicial district in which you reside within sixty (60) days from the date of receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing is otherwise made. See section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)) and section 422.210 of Social Security Administration Regulations No. 22 (20 CFR 422.210).

If a civil action is commenced, your complaint should name the Secretary of Health and Human Services as the defendant and should include the social security number(s) shown at the top of this notice.

Sincerely yours,

/s/ W. HOWARD O'BRYAN, JR.,

W. Howard O'Bryan, Jr.,
Acting Member, Appeals
Council

cc:
Mr. Miles Mims
Jamaica, NY 11427

HO Jamaica, NY (ALJ Hoppenfeld)

Form HA-L28-U7 (9-82)
1-82 version may be used

DEPARTMENT OF
Health and Human Services
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

ORDER OF APPEALS COUNCIL

REMANDING CASE TO ADMINISTRATIVE LAW JUDGE

In the case of	Claim for Period of Disability and Disability Insurance Benefits, and Supplemental Security Income
[Deleted from Document]	
Claimant)	
	[Deleted from Document]
(Wage Earner) (Leave blank if same as above)	(Social Security Number)

This case is before the Appeals Council for consideration of reopening its action of June 6, 1983 denying the claimant's request for review of the administrative law judge's decision.

After the Appeals Council took its action of June 6, 1983, new and material evidence was submitted. That evidence, a report dated June 12, 1982 from Transitional Services for New York, Incorporated, suggests that the claimant's emotional impairment may be significantly more severe than reflected by the comment of the administrative law judge. The Council believes that with the

inclusion of the new report, the weight of the evidence of record is contrary to the administrative law judge's decision; that decision is, therefore, reviewable pursuant to sections 404.970(b) and 416.1470(b) of Social Security Administration Regulations Nos. 4 and 16.

Therefore, the Appeals Council vacates it earlier action, grants the request for review and, under authority of section 404.977 of Social Security Administration Regulations No. 4 (20 CFR 404.977) and section 416.1477 of Social Security Administration Regulations No. 16 (20 CFR 416.1477), vacates the hearing decision and remands his case to an administrative law judge for further proceedings, including a new decision.

The administrative law judge shall obtain a consultative psychiatric examination with psychological testing, and a medical assessment describing the claimant's ability to reason or make occupational, personal or social adjustments.

The administrative law judge may take any action not inconsistent with this order of remand.

APPEALS COUNCIL

/s/ DAVID G. DANZIGER
David G. Danziger, Member

/s/ JEANETTE E. PERRY
Jeanette E. Perry, Member

Date: October 6, 1983
Form HA-517 (9/81)

f. RICHARD ROE III
Plaintiffs' Exhibit 48

Supplemental Security Income
Notice of Disapproved Claim – Disability

From: Department of Health and Human Services
Social Security Administration

Date: JUN 21, 1982
Social Security Number
[Deleted from Document]

[Deleted from Document]
c/o Goddard Riverside Center
161 West 87 Street
New York, N.Y. 10024

After a careful review of your case, we have determined that you are not eligible to receive Supplemental Security Income payments under the provisions of title XVI of the Social Security Act. Attached to this notice is an explanation of the decision we made in your claim and how we arrived at it.

The evidence shows that you do not meet either the blindness or disability requirements for Supplemental Security Income payments. To get Supplemental Security Income checks because of disability, you must be unable to work due to a medical condition which has lasted or will last at least 12 months in a row. The impairment must be so severe as to keep you from working not only at your usual job but in any other substantial gainful work considering your age, education, training, and work experience. After carefully studying your records, including the medical evidence and your statements, and considering your age, education, training and experience, it has been determined that your condition is not disabling and you do not meet the disability requirements for eligibility.

The disability/blindness decision in your case was made by the Social Security Administration (*not your personal physician*) on the basis of a determination by an agency of the State in which you live. Physicians and other trained disability evaluation personnel in the State agency participate in making such determinations.

If your condition gets worse, you may file a new application for Supplemental Security Income payments.

If at any time in the future you think you qualify for payment, please contact us immediately about filing a new application. We cannot make payment for any month before the month in which in which you apply.

This decision refers only to your claim for Supplemental Security Income payments. If you also filed a claim for Social Security payments, a decision on that claim will be sent to you in a separate notice.

Enclosure:
SSA Publication No. 05-11008

Important: See other side for an explanation of your appeal rights and other information.

Form SSA-L1131-U2 (8-80)

Social Security
Notice of Disapproved Claim

From: Department of Health and Human Services
Social Security Administration

Date: JUN 21 1982
Claim Number
[Deleted from Document]

[Deleted from Document]
c/o Goodard Riverside
Center
161 West S7 Street
New York, N.Y. 10024

We have determined that you are not entitled to disability insurance benefits because you do not meet the disability requirement of the law. In reaching this decision we considered how much your condition has affected your ability to work. After carefully studying your records, including the medical evidence and your statements, and considering your age, education, training, and experience, it has been determined that your condition is not disabling within the meaning of the law.

If your condition should get worse and prevent you from doing any substantial gainful work, you should get in touch with any social security office about filing another disability application. An explanation of the disability requirement and the earnings requirement is given on the back of this notice.

If you believe that this determination is not correct, you may request that your case be re-examined. If you want this reconsideration, you must request it not later than 60 days from the date you receive this notice. You may make your request through any social security office. If additional evidence is available, you should submit it with your request. Please read the enclosed leaflet for a full explana-

tion of your right to question the determination made on your claim.

If you do not request reconsideration of your case within the prescribed time period, you still have the right to file another application at any time.

If you have any questions about your claim, you may get in touch with any social security office. Most questions can be handled by telephone or mail. If you visit an office, however, please take this letter with you.

Enclosure:
SSA Pub. No. 05-10058

Important: See other side for additional information

Department of Health and Human Services
Social Security Administration

Form SSA-L808.1T-U2 (4-81)
Prior editions may be used

Additional information
about your claim

Any special situation involving your claim will be indicated by one or more of the blocks checked below:

(2) ☐ The application you filed is also an application for additional State payments under the Supplemental Security Income Program. For reasons shown in the enclosed notice, you are not eligible for such payments from your State. The application you filed with us is not an application for medical assistance (Medicaid). If you need medical assistance or have any questions about your eligibility for Medicaid, you should get in touch with your local social security agency.

(416) ☐ Because you had already requested reconsideration on your Social Security disability claim when you filed your Supplemental Security Income claim, we processed your Supplemental Security Income claim as though you had requested reconsideration on it as well. Thus, this determination is both an initial and reconsideration determination.

(841) ☐ This decision refers only to your claim for Supplemental Security Income payments—Any decision about your benefits under the Social Security Disability Insurance program will be sent to you in a separate notice.

(2, 416, 841)

Department of Health and Human Services
Social Security Administration

Par. No. 800B (8/81)

Additional information
about your claim

Any special situation involving your claim will be indicated by one or more of the blocks checked below:

(585) ☐ Because you had already requested a reconsideration on your Supplemental Security Income claim when you filed for social security disability benefits, we processed your social security claim as though you had requested a reconsideration on it as well. Thus this notice is both an initial and a reconsideration determination.

(MG07) ☐ In addition, you are not entitled to any other type of benefit based on the application you filed.

(RG08) ☐ In addition, you are not entitled to any other benefit based on the application you filed with the possible exception of _____ _____ benefits. As soon as a determination is made on your entitlement to _____ benefits, you will be notified of the decision.

(585, MG07, RG08)
Department of Health and Human Services
Social Security Administration

Par. No. 800A(8/81)

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Social Security Administration

DISABILITY DETERMINATION RATIONALE

Name of Claimant	SSN
[Deleted from Document]	[Deleted from Document

The evidence used to decide your claim was obtained from Carl Ringler, M.D. 5/19/82. Health Disability Consulting Services 5/28/82. You said you were disabled because of a mental disorder. The medical evidence shows that you have had some difficulty relating to other people, some difficulty in stressful situations. Since you were treated, your condition has improved. We realize you are unable to perform certain kinds of work. However, you are able to perform a job in which you would have simple tasks.

We realize that your condition prevents you from returning to your usual job, however, there are many other jobs that you can do.

WE's Name (If CDB or DWB Claim)		Type of Claim		(Initial and Date)
Disability Examiner DDS	Date	Review Physician DDS	Date	
Disability Examiner SSA	Date	Disability Examiner SSA	Date	

FORM SSA-4268-U6 (8-80)

1 FOLDER COPY

Additional information
about your claim

Any special situation involving your claim will be indicated by one or more of the blocks checked below:

(2) ☐ The application you filed is also an application for additional State payments under the Supplemental Security Income Program. For reasons shown in the enclosed notice, you are not eligible for such payments from your State. The application you filed with us is not an application for medical assistance (Medicaid). If you need medical assistance or have any questions about your eligibility for Medicaid, you should get in touch with your local social security agency.

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(841) ☐ This decision refers only to your claim for Supplemental Security Income payments—Any decision about your benefits under the Social Security Disability Insurance program will be sent to you in a separate notice.

(2, 416, 841)

Department of Health and Human Services
Social Security Administration

Par. No. 800B (8/81)

Social Security
Notice of Reconsideration

From: Department of Health and Human Services
Social Security Administration
wbj 7/15/82 1-E-R5

Date:
Claim Number: JUL 22 1982

[Deleted from Document]
c/o Goddard Riverside Center
161 W. 87 St.
NY, NY 10024

[Deleted from Document]

Claim for

☐ Disability Insurance Benefits
☐ Disabled Widow, Widower Benefits
☐ Childhood Disability Benefits

Upon receipt of your request for reconsideration we had your claim independently reviewed by a physician and disability examiner in the State agency which works with us in making disability determinations. The evidence in your case has been thoroughly evaluated; this includes the medical evidence and the additional information received since the original decision. We find that the previous determination denying your claim was proper under the law. The reverse of this notice identifies the legal requirements for your type of claim.

If you believe that the reconsideration determination is not correct, you may request a hearing before an administrative law judge of the Office of Hearings and Appeals. If you want a hearing, you must request it not later than 60 days from the date you receive this notice. You may make your request through any social security office. Read the enclosed leaflet for a full explanation of your right to appeal.

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Enclosure:
SSA Pub. No. 70-10282

Important: See other side for additional information.

U.S. GOVERNMENT PRINTING OFFICE,:
1982—357-235

DEPT OF HEALTH AND HUMAN SERVICES
Social Security Administration
wbj 7/15/82 1-E-R5

DISABILITY DETERMINATION RATIONALE

Name of Claimant	SSN
[Deleted from Document]	[Deleted from Document]

The determination on your claim was made by an agency of the State and not by the individuals or agencies who submitted reports. The evidence used to decide your claim was obtained from Dr. Rinzler's report of 5/19/82 and Health Disability's report of 5/28/82. Reports were obtained from every source you gave us. You said you were disabled because of a mental disorder. The medical evidence shows that you have had some difficulty relating to other people and some difficulty in stressful situations. Since you were treated, your condition has improved. We realize you are unable to perform certain kinds of work. However, you are able to perform a job in which you would have simple tasks.

We realize that your condition prevents you from returning to your usual job, however, there are many other jobs that you can do.

WE's Name (If CDB or DWB Claim)		Type of Claim		(Initial and Date)
Disability Examiner DDS	Date	Review Physician DDS	Date	
Disability Examiner SSA	Date	Disability Examiner SSA	Date	

[Illegible]

RICHARD ROE IV
Plaintiffs' Exhibit 49

Supplemental Security Income
Notice of Disapproved Claim – Disability

From: Department of Health and Human Services
Social Security Administration

Date: [Illegible]

[Deleted from Document]
c/o First Moravian Church
152 Lux Ave
NY, NY 10016

Social Security Number:
[Deleted from Document]

After a careful review of your case, we have determined that you are not eligible to receive Supplemental Security Income payments under the provisions of title XVI of the Social Security Act. Attached to this notice is an explanation of the decision we made in your claim and how we arrived at it.

The evidence shows that you do not meet either the blindness or disability requirements for Supplemental Security Income payments. To get Supplemental Security Income checks because of disability, you must be unable to work due to a medical condition which has lasted or will last at least 12 months in a row. The impairment must be so severe as to keep you from working not only at your usual job but in any other substantial gainful work considering your age, education, training, and work experience. After carefully studying your records, including the medical evidence and your statements, and considering your age, education, training and experience, it has been determined that your condition is not disabling and you do not meet the disabiilty requirements for eligibility.

The disability/blindness decision in your case was made by the Social Security Administration (*not your personal/physician*) on the basis of a determination by an agency of

the State in which you live. Physicians and other trained disability evaluation personnel in the State agency participate in making such determinations.

If your condition gets worse, you may file a new application for Supplemental Security Income payments.

If at any time in the future you think you qualify for payment, please contact us immediately about filing a new application. We cannot make payment for any month before the month in which you apply.

This decision refers only to your claim for Supplemental Security Income payments. If you also filed a claim for Social Security payments, a decison on that claim will be sent to you in a separate notice.

Enclosure:
SSA Publication No. 05-11008

Important: See other side for an explanation of your appeal rights and other information.

Form SSA-L1131-U2 (8-80)

DEPT OF HEALTH AND HUMAN SERVICES
Social Security Administration

DISABILITY DETERMINATION RATIONALE

Name of Claimant	SSN
[Deleted from Document]	[Deleted from Document]

The determination on your claim was made by an agency of the State and not by the individuals or agencies who submitted reports. The evidence used to decide your claim was obtained from Harvey B. Feinberg, M.D. 9/9/82.

We did not obtain any other reports because no others were available. You said you were disabled because of an emotional problem. The medical evidence shows that you have had some difficulty relating to other people.

WE's Name (If CDB or DWB Claim)		Type of Claim		(Initial and Date)
Disability Examiner DDS	Date	Review Physician DDS	Date	
Disability Examiner SSA	Date	Disability Examiner SSA	Date	

FORM SSA-4268-U6 (8-80)

1. FOLDER COPY

Supplemental Security Income
Notice of Reconsideration – Disability

From: Department of Health, Education, and Welfare
Social Security Administration
wdd 11/23/82 1/E/R5

	Date:
[Deleted from Document]	Social Security Number:
152 Lexington Ave.	Reconsideration Filed:
New York, NY 10016	[Deleted from Document]

Upon receipt of your request for reconsideration we had your claim independently reviewed by a physician and disability examiner in the State agency which works with us in making disability determinations. The evidence in your case has been thoroughly evaluated; this includes the medical evidence and the additional information received since the original decision. We find that the previous determination denying your claim was proper under the law. Attached to this notice is an explanation of the decision we made in your claim and how we arrived at it.

If you believe that the reconsideration determination is not correct, you may request a hearing before an administrative law judge of the Office of Hearings and Appeals. If you want a hearing, you must request it not later than 60 days from the date you receive this notice. You may make your request through any social security office. Read the enclosed leaflet and the reverse side of this notice for a full explanation of your right to appeal.

Please get in touch with social security if you believe this decision is wrong or you have any questions or need more information. Most questions can be handled by phoning or writing any social security office. If you visit a social security office, please bring this notice with you. If the decision in your case is based on incorrect information, we'll be happy to make whatever change is necessary.

Enclosure:
SSA Pub. No. 70-10281

[Deleted from Document]

Important: See other side for an explanation of your appeal rights and other information

Form SSA-L1130-U2 (8-80)

DEPT OF HEALTH AND HUMAN SERVICES
Social Security Administration

wdd 11/23/82 I/E/R5

DISABILITY DETERMINATION RATIONALE

Name of Claimant	SSN
[Deleted from Document]	[Deleted from Document]

The determination on your claim was made by an agency of the State and not by the individuals or agencies who submitted reports. The evidence used to decide your claim was obtained from S. Barrish, M.D., report of 11/10/82; Richard King, M.D., report of 11/10/82. We did not obtain any other reports because this gave us enough information. You said you were disabled because of an emotional problem. The medical evidence shows that you have had the ability to function normally in every day life.

Your condition does not prevent you from working.

WE's Name (If CDB or DWB Claim)	Type of Claim			(Initial and Date)
Disability Examiner DDS	Date	Review Physician DDS	Date	
Disability Examiner SSA	Date	Disability Examiner SSA	Date	

FORM SSA-4268-U6 (5-80)

1. FOLDER COPY

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

[Deleted from Document]
152 Lexington Avenue
New York, NY 10016

NOTICE OF FAVORABLE DECISION
PLEASE READ CAREFULLY

The enclosed decision is favorable to you, either wholly or partly. If you are satisfied with the decision, there is no no need for you to do anything at the present time. Further action on the decision will proceed automatically.

If you disagree with the decision, you have the right to request the Appeals Council to review it within 60 days from the date of receipt of the notice of this decision. It will be presumed that this notice is received within 5 days after the date shown below, unless a reasonable showing is made otherwise. You (or your representative) may file a request for review at your local Social Security office or at the hearing office, or you may write or telephone these offices indicating your intent to request review. You may also submit a written request for review directly to the Appeals Council, Office of Hearings and Appeals, SSA, P.O. Box 2518, Washington D.C. 20013.

The Appeals Council may, on its own motion, within 60 days from the date shown below, review the decision, which could possibly result in a change in the decision (20 CFR 404.969 and 416.1469). After the 60 day period, the Appeals Council generally may only represent and revise the decision on the basis of new and material evidence, or if a clerical error has been made as to the amount of the

benefits or where there is an error as to the decision on the face of the evidence on which it is based (20 CFR 404.988 and 416.1488; 42 CFR 405.750 and 405.1570). If the Appeals Council decides to review the enclosed decision on its own motion or to reopen and revise it, you will be notified accordingly.

Unless you timely request review by the Appeals Council or the Council reviews the decision on its own initiative, you may not obtain a court review of your case. (section 205(g) 1631(c)(3), or 1869(b) of the Social Security Act).

This notice and enclosed copy of
decision mailed
May 31, 1983

cc:
Name and Address of Representative:
Jennifer Barrows
152 Lexington Avenue
New York, NY 10016

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

DECISION

In the case of	Claim for
[Delete from Document]	Period of Disability, Disability Insurance Benefits, and Supplemental Security Income
(Claimant)	
	[Deleted from Document]
(Wage Earner) (Leave blank if same as above)	(Social Security Number)

This case is before the administrative law judge on a request for hearing. Claimant was represented by Jennifer Barrows, Program Director of the First Moravian Church.

ISSUES

The general issues before the administrative law judge are whether the claimant is entitled to a period of disability and to disabiilty insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, as amended; and whether the claimant is disabled under section 1614(a)(3)(A) of the Social Security Act. The specific issues are whether the claimant was under a "disability," as defined in the Act; if so, where such "disability" commenced and the duration thereof; and whether the special earnings requirements of the Act are met for the purpose of entitlement to a period of disabiilty and disability insurance benefits.

EVALUATION OF THE EVIDENCE – APPLICABLE REGULATIONS

Sections 404.1520(b) and 416.920(b) of the regulations (20 CFR 404.1520(b) and 416.920(b)) provide that an individual who is working and engaging in substantial gainful activity will not be found to be "disabled" regardless of medical findings. Sections 404.1520(c) and 416.920(c) (20 CFR 404.1520(c) and 415.920(c) provide that an individual who does not have a "severe impairment" will not be found to be "disabled." Sections 404.1520(d) and 416.920(d) (20 CFR 404.1520(d) and 416.920(d)) provide that if an individual is not working and is suffering from a severe impairment which meets the duration requirement (i.e., has lasted or is expected to last for a continuous period of at least 12 months) and which "meets or equals a listed impairment in Appendix 1," a finding of "disabled" will be made without consideration of vocational factors. Sections 404.1520(e) and 416.920(e) (20 CFR 404.1520(e) and 416.920(e)) provide that if, despite a severe impairment, an individual is capable of performing work he or she has done in the past, a finding of "not disabled" must be made. Finally, sections 404.1520(f) and 416.920(f) (20 CFR 404.1520(f) an 416.920(f) provide that if an individual's impairment is so severe when considered in conjunction with age, education, and work experience that he or she may not do his or her past work or any other work, a finding of "disabled" will be made.

Form HA-514 U9 (3-82)

In establishing criteria for the evaluation of mental impairments, sectors 404.1545(c) and 416.945(c) of the regulations (20 CFR 404.1545(c) and 416.945(c)) provides for consideration of factors such as the ability to understand, to carry out and remember instructions, and to respond appropriately to supervision, co-workers and work pressures in a work setting.

Claimant was 43 years old upon application for disability benefits pursuant to Titles II and XVI of the Act. Claimant alleged impairment due to emotional problems. (Exhibit 14)

Claimant testified that he completed the 12th grade of school and served 4 years in the Marines and 2 years in the Reserves. He last worked in September 1982 as a desk clerk. Before that, he was a shipping clerk for 6 years. He was employed also as a delivery man, capable of heavy lifting. He submitted information that he worked as a nursing attendant. (Exhibit 14)

[The claimant] claimed psychiatric impairment but denied treatment for this or any medical condition. He claimed "wounds" from his hips to knees (bilaterally) which he attributed to medication. [The claimant] acknowledged prior hospitalization in the State of Michigan for his "throat" in 1964 when he was given thorazine. It is incongruous, however, that claimant is still taking the same medication almost 20 years later, while denying present treatment.

Claimant alleged that he is undomiciled, that he sleeps at a church, but it could be a different one each night. During the day he alleged spending his time on 42nd Street waiting for the IRS. I found claimant's remarks rambling, confusing and lacking in coherence.

A consulting psychiatrist of the First Moravian Church found claimant shabbily dressed. He was depressed. Speech was rambling irrelevant with evidence of a thought disorder with feelings of persecution. He was oriented but insight and judgment were poor. He had been housed by the church for more than one year carrying a suitcase with his belongings. He rarely spoke to other individuals and rarely involved himself in any activities. It was considered that claimant could not cope with minimal stress because he becomes confused and suspicious. (Exhibit 18) Diagnosis was schizophrenia paranoid with depression, with inability to function and deal with others. (Exhibit 21)

The evidence further demonstrated this claimant's agitation when his real name was discovered. This together with his delusional thoughts and his aimlessness reveal to me the extent of this claimant's impairment. (Exhibit 23)

A consultative examiner did not consider claimant delusional or paranoid. Nonetheless, he diagnosed "severe schizoid personality disorder" and "psychosocially deteriorated lifestyle". It was recommended that claimant receive psychiatric care and medication. (Exhibit 22)

I find that such a diagnosis indicates a severe psychiatric impairment which is consistent with claimant's treating psychiatrist. The evidence adduced leads to the irrefutable conclusion that claimant meets the listings under Section 12.03 A1 and B. This claimant is "disabled" pursuant to his applications filed on September 9, 1982.

FINDINGS

After careful consideration of the entire record, the administrative law judge makes the following findings:

1. The claimant met the special earnings requirements of the Act on September 9, 1982, the date the claimant stated he became unable to work, and continues to meet them through June 30, 1985.
2. The claimant has not engaged in substantial gainful activity since September 9, 1982.
3. Claimant is 43 years old, educated through the 12th year. He held a variety of jobs as desk and shipping clerk, delivery man, and nursing attendant.
4. The medical evidence establishes that the claimant has schirophrenia, paranoid type with depression and inability to function or relate with others.
5. The claimant's impairment meets the listing for severity of impairment under Section 12.03 A1 and B, which is expected to last for 12 months or more.
6. Claimant is "disabled".

DECISION

It is the decision of the administrative law judge that, based on the application filed on September 9, 1982, the claimant is entitled to a period of disability commencing

September 9, 1982 and to disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act.

It is the further decision of the administrative law judge that as of the date of the application for supplemental security income filed on September 9, 1982, the claimant was "disabled" as defined in Section 1416(a)(3)(A) of the Social Security Act and that the claimant's disability has continued at least through the date of this decision.

4

The component of the Social Security Administration responsible for authorizing supplemental security income payments will advise the claimant regarding the non-disability requirements for these payments, and if eligible, the amount and the month(s) for which payment will be made.

Date: May 31, 1983

/s/ ROBERT SCHWARTZ
Robert Schwartz
U.S. Administrative Law
Judge

RICHARD ROE V
Plaintiffs' Exhibit 50

Social Security
Notice of Reconsideration

From: Department of Health and Human Services
Social Security Administration
wpg 1/4/83 4/K/R11

Date: JAN 07 1983

[Deleted from Document]
240 20 68 Dr.
Flushing, NY 11367

Claim Number:
[Deleted from Document]

Claim for
☐ Disability Insurance Benefits
☐ Disabled Widow, Widower Benefits
☐ Childhood Disability Benefits

Upon receipt of your request for reconsideration we had our claim independently reviewed by a physician and disability examiner in the State agency which works with us in making disability determinations. The evidence in your case has been thoroughly evaluated; this includes the medical evidence and the additional information received since the original decision. We find that the previous determination denying your claim was proper under the law. The reverse of this notice identifies the legal requirements for your type of claim.

If you believe that the reconsideration determination is not correct, you may request a hearing before an administrative law judge of the Office of Hearings and Appeals. If you want a hearing, you must request it not later than 60 days from the date you receive this notice. You may make your request through any social security office. Read the enclosed leaflet for a full explanation of your right to appeal.

If you do not request a hearing of your case within the prescribed time period, you still have the right to file another application at any time.

If you have questions about your claim, you should get in touch with any social security office. Most questions can be handled by telephone or mail. If you visit an office, however, please take this letter with you.

Enclosure:
SSA Pub. No. 70-10282

Important: See other side for additional information

Form SSA-L928-U2 (8-80)
Prior editions may be used until supply is exhausted

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Social Security Administration

wpg 1/4/83 [Illegible]/R11

DISABILITY DETERMINATION RATIONALE

Name of Claimant	SSN
[Deleted from Document]	[Deleted from Document]

The determination on your claim was made by an agency of the State and not by the individuals or agencies who submitted reports. The evidence used to decide your claim was obtained from L. Feigin, MD, report of 12/82, and L. Lin, MD, report of 12/82. Reports were obtained from every source you gave us. You said you were disabled because of an emotional problem. The medical evidence shows that you have had some difficulty in stressful situations. Since you were treated, your condition has stabilized. We realize you are unable to perform certain kinds of work. However, you are able to perform a job in which you would have simple tasks.

Based on your description of your usual job as a messenger, your condition does not prevent you from returning to this work.

WE's Name (If CDB or DWB Claim)	Type of Claim		(Initial and Date)
Disability Examiner DDS / Date	Review Physician DDS / Date		
Disability Examiner SSA / Date	Disability Examiner SSA / Date		

FORM SSA-4268-U6 (8-80)

1. FOLDER COPY

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

[Deleted from Document]
235-61 Hillside Avenue
Jamaica, N.Y. 11432

NOTICE OF DECISION-DENIAL
PLEASE READ CAREFULLY

If you disagree, in whole or in part, with the enclosed decision you may request the Appeals Council to review it. However, your request for review must be filed within *60* days after the date of receipt of this notice. It will be presumed that this notice is received within 5 days after the date shown below, unless a reasonable showing is made otherwise.

If you wish to request review, you (or your representative) should file the request at your local social security office. The people there will supply you with a request for review form and will be glad to assist you in completing the form. However, if you prefer, you may file your request for review at the hearing office or by sending a letter, requesting review, directly to the Appeals Council, Office of Hearings and Appeals, P.O. Box 2518, Washington, D.C. 20013.

Unless you file a timely request for review by the Appeals Council, you may not obtain a court review of your case under section 205(g), 1631(c)(3), or 1869(b) of the Social Security Act.

This notice and enclosed copy of hearing
decision mailed
May 27, 1983

cc
Name and Address of Representative:
Miles Mims, Counselor at Transition Services
235-61 Hillside Avenue
Queens Village, N.Y. 11427

FORM HA-L5023-U6 (3-79) (Formerly HA-502.3)
Prior editions may be used until supply exhausted

REPRESENTATIVE

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

DECISION

In the case of	**Claim for**
[Deleted from Document]	Period of Disability, Disability Insurance Benefits, and Supplemental Security Income
(Claimant)	
	[Deleted from Document]
(Wage Earner) (Leave blank if same as above)	(Social Security Number)

This case is before the Administrative Law Judge on a request for hearing. The Administrative Law Judge has carefully considered all the documents identified in the record as exhibits, the testimony at the hearing and arguments presented.

ISSUES

The general issues are whether the claimant is entitled to a period of disability and disability insurance benefits under section 216(i) and 223, respectively, of the Social Security Act, as amended; and whether the claimant is disabled under section 1614(a)(3)(A) of the Act. The Social Security Act defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairment(s) which can be expected to either result in death or last for a continuous period of not less than 12 months.

The specific issues are whether the claimant was under a "disability" and, if so, when such disability commenced and the duration thereof; and whether the special earnings requirements of the Act are met for the purpose of entitlement to a period of disability and disability insurance benefits.

APPLICABLE REGULATIONS AND *EVALAUTION OF THE EVIDENCE*

Pursuant to the Act, the Secretary has established Regulations No. 4 and No. 16. The Regulations provide steps for evaluating disability (20 CFR 404.1520(a) and 416.920(a)). In addition, a claimant's impairment must meet the 12 month duration requirement before being found disabiling. A set order is followed to determine whether an individual is disabled. If it is determined that a *claimant is or is not disabled at any point in the review,* further review is not necessary.

Social Security Administration Regulations No. 4 and No. 16 require the Administrative Law Judge to consider the following in sequence:

2

1. An individual who is working and engaging in substantial gainful activity will not be found to be "disabled" regardless of medical findings (20 CFR 404.1520(b) and 416.920(b));

2. An individual who does not have a "severe impairment" will not be found to be "disabled" (20 CFR 404.1520(c) and 416.920(c));

3. If an individuai is not working and is suffering from a severe impairment which meets the duration requirement and which "meets or equals a listed impairment in Appendix 1" of Subpart P of Regulations No. 4, a finding of "disabled" will be made without consideration of vocational factors (20 CFR 404.1520(d) and 416.920(d));

4. If an individual is capable of performing work he or she has done in the past, a finding of "not disabled," must be made (20 CFR 404.1520(e) and 416.920(e));

5. If an individual's impairment is so severe as to preclude the performance of past work, other factors, including age, education, past work experience and residual functional capacity must be considered to determine if other work can be performed (20 CFR 404.1520(f) and 416.920(f)).

The rules set out in Appendix 2 of 2 of Subpart P of Regulations No. 4 are considered in determining whether a claimant with exertional impairments is or is not disabled. The regulations also provide that if an individual suffers from a nonexertional impairment as well as an exertional impairment, both are considered in determining residual functional capacity (20 CFR 404.1545 and 416.945). If a finding of disabled cannot be made based on strength

limitations alone, the rules established in Appendix 2 are used as a framework in evaluating "disability." In cases where the individual has solely a nonexertional impairment, a determination as to whether disability exists shall be based on the principles in the appropriate sections of the regulation, giving consideration to the rules for specific case situations in Appendix 2.

In applying the sequential steps outlined above, the Administrative Law Judge concludes that a decision on whether the claimant is disabled cannot be made based on work activity or on medical facts alone. After assessing the claimant's remaining capacity for work and the physical and mental demands of the work he has the done in the past, the Administrative Law Judge further concludes that the claimant has the residual functional capacity to do his past relevant work. Consequently, it must be found that the claimant is not disabled within the meaning of the Social Security Act.

Although claimant alleges a disability with an onset of April 6, 1981 (Exhibit 13) claimant's prior applications for a Period of Disability and Disability Insurance Benefit had been denied in October 1981 (Exhibit 2) as his impairment was not expected to last 12 months. This was confirmed on November 2, 1981 by claimant's treating psychotherapist (Exhibit 12) who reported that claimant had had a complete turn-around due to a change in medication, and currently had no significant psychiatric symptoms. He previously could not handle stress, interact in a work setting or meet production standards. He had no frustration tolerance, had delusions, was paranoid and had markedly restricted daily activities. However at present he was interacting to the best of his ability and was looking for a job; his only problem was in relating to his family.

On August 19, 1982 Dr. S. Lim from Central Queens Outpatient Department reported (Exhibit 29) that claimant had several past psychiatric hospitalizations precipitated by his relationship with his mother. Diagnosis was schizophrenic disorder, paranoid chronic. As of August 8, 1982 he showed silly, immature behavior with circumstantial speech, anxious and angry towards his mother but mood otherwise neutral. He had fair personal hygiene, coherent and relevant speech with no overt delusions or hallucinations. Intelligence was average, insight fair but judgment was impaired. He was not motivated in any activities and had only superficial personal relationships.

On consultative psychiatric examination of September 10, 1982 (Exhibit 30) Dr. Jennie Mauceri noted that claimant related well, was somewhat overproductive but rational. He was fully oriented with good memory and revealed good intelligence. He did not express any gross psychotic locations but stated that he felt depressed off and on. He did not express any obsessional ideation but was somewhat anxious about his future and did not seem to have any specific clear goals. He was living in his parent's home and would go out to visit a friend, to go to the movies or a health spa. Diagnosis was schizophrenic reaction, paranoid, in remission. Based upon the above findings a review physician with the Office of Disability Determinations concluded (Exhibit 31) that claimant had a moderate impairment of the ability to perform work requiring frequent contact with others, perform complex and varied tasks. He had at most a mild impairment of the ability to comprehend and follow instructions, perform simple tasks and respond to work related stresses.

On October 19, 1982 Dr. Lim indicated (Exhibit 32) that claimant showed slow progress and at times became aggressive and immature, although he was not verbally abusive. Thought processes remained concrete and dis-

organized. Work-related abilities were mildly to moderately impaired. On consultations of December 23, 1982 (Exhibit 33) Dr. L. Zeiguar noted that claimant was neat and clean, wearing jeans, sneakers and sport clothing. He established good eye contact, was cooperative and volunteered useful information, but under pressured speech. Affect was blunted and mechanical, but mood was neutral and stable and he was responsive and appropriate. Speech was goal-oriented and logical but a bit obsessive and at times circumstantial. He denied delusions or hallucinations. Intelligence was at least bright normal; he had no problem with calculations and had a good fund of current information. Reality testing, judgment, impuse control and insight appeared fair at present. Diagnosis was chronic paranoid schizophrenia. On April 6, 1983 claimant's treating psychiatrist indicated (Exhibit 41) that claimant's current behavior was marked by transient but recurrent agitation, pressured speech and verbalized, persistent anger at many types of past incidents and previously known persons. His counselor at Transitional Services (Exhibit 43) indicated that his behavior there could be described as histrionic; emotionally unstable and self-dramatizing, attention-seeking and immature. He was also self-concerned, condescendingly aloof to his peers but quite concerned about the approval of others.

Claimant testified that he is a 30 years old native New Yorker who weighs his usual 158 pounds at 5′ 11″ of height. He lived with his parents until December 8, 1982 when he moved into the Transitional Services dormitory. He is able to use public transportation and borrows his father's car 2 to 3 times a week to go to the movies. He graduated from Queens College in 1978 and has worked as a stock boy, salescheck writer at a warehouse, mail clerk, inside messenger and file clerk. He stated that he was fired from his last job as he was taking his hostility out on his coworkers, and submitted a letter from his last employer (Exhibit 42) to verify this. He has worked occasionally

since then for a few days at a time on a part time basis as a dishwasher at a restaurant. He stated that he has problems still with projecting his hostilities onto other people, looking down on them as that is the way the world treats him. He get depressed occasionally and agitated quite often. He described himself as a lone-wolf, keeping to himself as people bother him sometimes. He takes Thorazine 50 mg. 2 times a day, sees a psychiatrist once a month and a psychotherapist 4 times a month. He was in an OVR-Vetap Program, but just changed to Project Careers, attending 3 hours a day to learn typing and clerical skills. After 20 weeks he could be put in a voluntary job or a full pay job depending upon his progress. He stated that the first week he had difficulty settling down, but he is improving; he is able to type 33 words per minute, is learning to cope with other people and is now on time every day. On the weekends he goes to the movies as a escape, and reads a lot. He is also president of the Resident's Council at his dormitory, enjoys improving his cooking skills and jogs 4 miles a day. He drinks once or twice a week (2 scotches and water) and smokes 1 to 4 packs of cigarettes a day depending on "pressures."

The medical evidence shows that claimant's conditions are not attended by clinical findings that meet or equal in severity the requirements of Appendix 1, Subpart P, Regulations No. 4. Moreover, claimant is not engaging in substantial gainful activity. Consequently, the issue before the Administrative Law Judge is whether claimant's impairments prevent him from performing his usual work; and, if so, whether those impairments prevent him from performing other kinds of substantial gainful activity. The records establishes a diagnosis of chronic paranoid schizophrenia, with overt psychotic symptoms controlled by medication. Despite his outbursts of inappropriate behavior the record is generally clear that claimant could

engage, as before, in such low stress work as a messenger. His daily activities and interests are not markedly restricted; he interacts with the residents group, goes out to the movies, jogs and cooks. Although somewhat paranoid about his parents, especially his mother, he has demonstrated the ability these past several months to engage in a sustained activity (attending OVR sponsored classes and work activities); there is nothing set forth that would convincingly establish otherwise. Being out of the home environment might in this case be a plus for claimant. Although living in a structured group environment, he is able to travel on public transportation and sustain a low stress work activity. His medication is of a moderate nature and should not interfere with sustenance of activity. As claimant has the residual functional capacity to perform his past relevant work activity as a messenger, he cannot be found "disabled" within the meaning of the Social Security Act.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant met the special earnings requirements of the Act on April 6, 1981, the date the claimant stated he became unable to work, and continues to meet them through at least September 30, 1984.
2. The claimant has not engaged in substantial gainful activity since April 6, 1981.
3. The medical evidence establishes that the claimant has severe chronic paranoid schizophrenia, but that he does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.

4. The claimant has the residual functional capacity to perform work-related functions except for work involving stressful situations and frequent interpersonal contact with others (20 CFR 404.1545 and 416.945).
5. The claimant's past relevant work as messenger did not require the above limitation(s) (20 CFR 404.1565 and 416.965).
6. The claimant's impairment does not prevent the claimant from performing his past relevant work.
7. The claimant was not under a "disability" as defined in the Social Security Act, at any time through the date of the decision (20 CFR 404.1520(c) and 416.920(c)).

DECISION

It is the decision of the Administrative Law Judge that, based upon the applications filed on July 28, 1982, the claimant is not entitled to a period of disability or disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, and is not eligible for supplemental security income under sections 1602 and 1614(a)(3)(A) of the Act.

/s/ SOL A. WIESELTHIER
Sol A. Wieselthier
Administrative Law Judge

May 27, 1983
Date

DEPARTMENT OF HEALTH & HUMAN SERVICES
Social Security Administration

July 13, 1983

Refer to
SGC
[Deleted from Document]

Office of Hearings and Appeals
PO Box 2518
Washington DC 20013

[Deleted from Document]
235-61 Hillside Ave.
Jamaica, NY 11432

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Dear Mr. Lipp:

Re: Your Claims for Disability Insurance Benefits and Supplemental Security Income

The request for review of the hearing decision in your case has been considered. Sections 404.970 and 416.1470 of Social Security Administration Regulations Nos. 4 and 16 (20 CFR 404.970 and 416.1470) provide that the Appeals Council will grant a request for review of a hearing decision where: (1) there appears to be an abuse of discretion by the administration law judge; (2) there is an error of law; (3) the administrative law judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest.

The Appeals Council has concluded that there is no basis under the above regulations for granting the request for review. Accordingly, your request is denied and the hearing decision stands as the final decision of the Secretary in your case.

If you desire a court review of the hearing decision, you may commence a civil action in the district court of the United States in the judicial district in which you reside within sixty (60) days from the date of receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing is otherwise made. See sections 205(g) and 1631(c)(3) of the Social Security Act, as amended (42 U.S.C. 405(g) and 1383(c)(3)) and section 422.210 of Social Security Administration Regulations No. 22 (20 CFR 422.210).

If a civil action is commenced, your complaint should name the Secretary of Health and Human Services as the defendant and should include the social security number(s) shown at the top of this notice.

Sincerely yours,

/s/ DAVID G. DANZIGER

David G. Danziger
Member, Appeals Council

cc:
Ms. Marguerite Murphy
Jamaica, NY 11432

HO, Jamaica, NY (ALJ Wieselthier)

Form HA-L32 U7 (10-81)

BEST AVAILABLE COPY

RESIDUAL FUNCTIONAL CAPACITY ASSESSMENT

1E [redacted]	SSN [redacted]
NOTICE — Conclusions of functional capacity MUST be based on the documented symptoms, signs, and laboratory findings which are attributable to established impairment(s). The clinical basis for judgments of functional limitation or capacity MUST be identified.	ASSESSMENT IS FOR: ☐ Current Evaluation ☐ 12 Mo. After Onset 174 (DATE) ☐ Date Last Insured: (DATE)

☑ NO PHYSICAL IMPAIRMENT — REFER TO MENTAL CAPACITIES ASSESSMENT (Page 3)

I. PHYSICAL CAPACITIES ASSESSMENT

A. Basic Strength Factors (Items 1 - 6):

☐ UNLIMITED

☐ LIMITED, BUT RETAINS MAXIMUM CAPACITIES TO:

1. LIFT (including upward pulling) and/or CARRY:
   ☐ 10 lbs. ☐ 20 lbs. ☐ 50 lbs. ☐ 100 lbs. or More
2. FREQUENTLY LIFT and/or CARRY:
   ☐ 10 lbs. ☐ 25 lbs. ☐ 50 lbs. or More
3. OCCASIONALLY LIFT and/or CARRY:
   ☐ LESS than 10 lbs. (e.g., files, ledgers, small tools, etc.)
4. STAND and/or WALK a TOTAL of:
   ☐ LESS than ABOUT 6 hrs. (If marked limitation, explain)
   ☐ ABOUT 6 hrs. (Per 8-hr. day)
5. SIT a TOTAL of:
   ☐ LESS than about 6 hrs.
   ☐ ABOUT 6 hrs. (Per 8 hr. day)
6. PUSH and/or PULL (Including hand/or foot controls):
   ☐ UNLIMITED
   ☐ LIMITED (Describe degree of limitation)

B. Other Physical Factors

	Frequently	Occasionally	Never
1. Climbing	☐	☐	☐
2. Balancing	☐	☐	☐
3. Stooping	☐	☐	☐
4. Kneeling	☐	☐	☐
5. Crouching	☐	☐	☐
6. Crawling	☐	☐	☐

	Unlimited	Limited
7. Reaching	☐	☐
8. Handling	☐	☐
9. Fingering	☐	☐
10. Feeling	☐	☐
11. Seeing	☐	☐
12. Hearing	☐	☐
13. Speaking	☐	☐

14. Environmental Restrictions (e.g., heights, machinery, temperature extremes, dust, fumes, humidity, vibration, etc.):
    ☐ None ☐ Yes (Describe in 1.C.)

C. Briefly describe in what ways the impaired activities (Items 7 - 14 ONLY) are limited:

SSA DISTRICT OFFICE 21150 JAN 11 1983 FLUSHING, NEW YORK

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EXHIBIT NO. 34
PAGE 1 OF 4 PAGES

☐ Continued on page 2

I.C. (Cont.)

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D. Briefly describe the principal clinical and laboratory findings and symptoms or allegations (including pain) from which the impairment-related capacities and limitations indicated in I.A, B., and C. were concluded. Also acknowledge any functional capacity limitation alleged by the individual or reported by a medical source which is different from that established and explain why the extent of limitation alleged or reported is not supported by the medical findings.

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PHYSICIAN'S SIGNATURE _____ DATE _____

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☐ NO MENTAL IMPAIRMENT — REFER TO PHYSICAL CAPACITIES ASSESSMENT (Page 1)

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II. MENTAL CAPACITIES ASSESSMENT (Complete ONLY for documented mental disorders)

A. Check the blocks representing the individual's ability to sustain the following mental activities and demands:

	Unlimited	Limited
1. Understand, remember, and carry out an extensive variety of technical and/or complex job instructions	☐	☑
2. Understand, remember, and carry out detailed but uncomplicated job instructions	☑	☐
3. Understand, remember, and carry out simple one- or two-step job instructions	☑	☐
4. Interact with supervisors and coworkers	☑	☐
5. Deal with the public	☐	☐
6. Maintain concentration and attention	☐	☑
7. Discuss any additionally identified mental function limitations in Section B.		

B. Briefly describe in what ways the mental functions and mental demands shown above as "limited" result in impaired capacity to perform the activities of work. Include discussion of the work-related effects of any additional mental function impairment not identified above.

WJE is of above average IQ
He is oriented X3 can establish
good eye contact He is
appropriate. Mood is neutral.
Speech was a bit ~~obsessive~~
obsessive & circumstantial.
Reality testing & judgement are
fair

☐ Continued on page 4

C. Briefly identify the principal medical findings and symptoms or allegations for which the impaired capacities indicated in II.A and B. were concluded.

Can respond to supervision
follow instructions
adequately meet
production
goals.

☐ Continued on page 4

PHYSICIAN'S SIGNATURE	DATE
	1/3

Page 3

158b

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158c.

Continuation Sheet — Indicate section(s) being continued.

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158c

U.S. GOVERNMENT PRINTING OFFICE : 1982 O-371-267

JOINT

APPENDIX

No. 84-1923

Supreme Court, U.S.
FILED
JAN 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED JUNE 7, 1985
CERTIORARI GRANTED OCTOBER 7, 1985

Volume II

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1923

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 82 0457

NEW YORK CITY ET AL, PLAINTIFFS,

v.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL, DEFENDANTS

United States Courthouse
Brooklyn, New York
October 31, 1983
9:30 o'clock A.M.

BEFORE: HONORABLE JACK B. WEINSTEIN, CHIEF, U.S.D.J.

[7] [MR. BERGDALL] I have set forth in our complaint—and it is set forth in the affidavits and in supporting papers that we have already filed with the Court. And even a large number of people, however, than have appealed to the Administrative Law Judge to find relief don't appeal. And we are going to have several witnesses in all three categories who are all going to testify both to the fact that that is the—the people don't appeal and why they don't appeal. The very simple reason is because they are mentally ill. They cannot navigate and won't navigate the rather strenuous bureaucratic channels of the Social Security Administration that ones has to go through.

Now, the reason I make that point is because I want to make it clear at the outset what we are not challenging, which is any standards that may be applied by the Administrative Law Judge in determining these cases.

THE COURT: Are they operating fairly and effectively? I notice in a number of the individual cases that the

Administrative Law Judge did reverse. If the Administrative Law Judge's system is operating [8] fairly and effectively and is untainted, and if the plaintiffs do utilize their procedures, then that is sufficient.

MR. BERGDALL: I don't believe so, your Honor. In the first place, let me make it clear what we are not raising. I can't say whether they are operating fairly or effectively. There has been a lot of evidence that has come forth in the summer in the course of Senate hearings that indicate that Administrative Law Judges have great pressure put on them to deny cases. And the reason I was making the statement this morning is to make clear that we are not raising those kinds of issues. I just don't know whether they are or not.

But even if they are making the best efforts to operate fairly and effectively, we are certainly not conceding that the taint from the illegal standard is removed by the Administrative Law Judge's process. And there are two reasons for it.

I am sorry. Do you have a question?

THE COURT: No.

MR. BERGDALL: The first one is that the record that comes to an Administrative Law Judge has documents in it that assess the residual functional capacity and the severity of the impairments that are prepared [9] by State and Social Security physicians and who have been operating on the basis of the illegal standards which we are challenging. It doesn't indicate that on the document, but it's there.

The second thing is, even if the Judges don't rely on those documents—we'll say that this person can work, in which it applies illegal standards. It places the Administrative Law Judge himself in the position of making very difficult judgments as to the residual functional capacity of the individual. How to assess the severity of that individual. And he literally has no proper guidance or standards or expert guidance from the Social Security Administration to do that.

THE COURT: One of the reasons I asked you is that down the line I guess we have to face the jurisdictional problem. If there is a fair system of adjudication before the Administrative Judge, particularly since there can be an appeal to the District Court, then the people who utilize that system arguably are not in a position to complain. As to the people that don't utilize the system, arguably they haven't exhausted their Administrative remedy so they can't complain. So arguably there's no jurisdiction over the individual.

* * * * *

[19] MR. KOOLYK: The whole question of treatment of medically impaired has been the subject of intense attention within the Bureau of Disability and Social Security. Matters have been raised in numerous meetings. There are study groups going on. There has been the litigation in Minnesota. As a result of this interest there has been reevaluations of attitude within the office of the psychiatry and in the central office in Baltimore, within the regional office and particularly with the state offices.

THE COURT: Well, I take it, that during the course if the proceedings I will find out what climate and attitude have to do with regulations. But I am sure you will advise me subsequently.

Are the plaintiffs satisfied as of this date protectively that regulations are being complied with? Are you withdrawing your application for future—

MR. BERGDALL: No, we are not. Wc certainly admit to the fact of change. There are a lot more medical allocations than there used to be.

THE COURT: All right.

MR. KOOLYK: If I might address myself more to the legal issues for a moment. With respect to the judicial issues, I think that they fall under two headings. First, there are the individuals who are [20] within the administrative process who haven't completed the process and received a final determination from the Secretary. And there is a question whether those persons should be before the

Court. But I think more significantly, in terms of the trial testimony, we believe that with respect to individuals who are adjudicated at the initial level for reconsideration or at the Administrative Law Judge level, they have failed to exhaust administrative remedies before this action was brought or actually has exhausted but failed to initiate judicial proceedings more than 60 days before the trial and that those persons are subject to a complete bar with respect to relief.

I think I will address it more fully in the trial brief, but I just want to draw counsel and the Court's attention now to the recent Lopez decision in California. The decision came up at the preliminary injunction conference with respect to Justice Renquists's stating that it was a case in which the medical proof standard of the social security was at issue. And more recently in an application to lift his stay, it was denied by a majority of the Court. And even two of the dissenters who published an opinion in that case agreed that with respect to individuals who had failed to initiate judicial proceedings more than 60 [21] days before the class was filed, those persons clearly could not receive Federal Court jurisdiction. So in the testimony and the proof that will be presented at trial we believe that many of the–

THE COURT: I did read Judge Rehnquist's Lopez memorandum. I have forgotten the–was it a state or city agency that was a party to that action? As I recall, Lopez was an individual.

MR. KOOLYK: Right. I believe it was not–there was no governmental policy.

THE COURT: I see.

MR. KOOLYK: In terms of the effect on the trial, I believe that the factual information in what was actually occurring in the state agency in 1980, most of '81 is of very little relevance to the class, on those who do have live claims before the Court.

THE COURT: But if those people who are denied benefits, if they reapply, they could not apply retroactively

because it would have to be under your analysis and new application. So a large part of the period to which they have been denied benefits could not be covered. They could go back one year, can't they, as I recall.

MR. KOOLYK: I think under Title 2 they can go back in one or two years.

* * * * *

[29] MR. BERGDALL: Your Honor, plaintiffs would like to call Dr. Anne Geller to the stand.

ANNE GELLER

called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION
BY MR. BERGDALL:

Q. Dr. Geller, where are you employed?

A. I am employed with the regional office of the Federal Government. My primary employment, however, is as Director of the Smithers Alcoholism Treatment and Training Center of St. Lukes, Roosevelt Hospital.

Q. In connection with the Federal Government, you're employed by the Social Security Administration; is that right?

A. Yes.

Q. In what positions do you hold there?

A. I'm a psychiatrist and by virtue of seniority having been there since 1974 I'm the chief psychiatrist.

Q. How long have you been chief psychiatrist?

A. Since the time when there was more than one psychiatrist, which was 1976.

[30] Q. Okay. From 1974 to 1976, what was your position?

A. I was a journeyman psychiatrist.

Q. Okay.

Doctor, would you briefly describe for the Court your medical training and professional experience?

A. Yes. I got my medical degree from Oxford University in England. I came to the States and did an internship and residency in neurology and psychiatry at the NYU division in Bellevue Hospital.

I then was at the Albert Einstein College of Medicine as an assistant professor of pharmacology on a variety of Government grants, doing primarily research in psychopharmacology, and I then became coordinator of treatment for Smithers Alcoholism Treatment and Training Center and I am now its director.

And since 1974, I've worked part-time for the Federal Government as a consultant.

Q. Are you a member of any professional associations?

A. Yes. I'm a member of the American Medical Society on Alcoholism, and the Medical Society of the State of New York.

Q. Doctor, just focusing on your role as chief psychiatrist in the region for the Social Security Administration, what are your responsibilities?

A. Okay. About 50 percent of my time I act as a [31] straightforward case reviewer. I'll elaborate on that later, if you wish. And the other 50 percent of the time I review all of those cases in which a psychiatrist within the office has had some objection to the state decision. Either they have objected to a denial and wish it to be an allowance or they have wanted to make an allowance into a denial.

Q. Okay. You say you're reviewing cases. Basically, it's the function of regional psychiatrist, in your staff, to review cases that are decided by the State Office of Disability determinations; is that correct?

A. Yes.

Q. You review them to determine whether or not the decision was correct and in accordance with Social Security guidelines?

A. Right.

Q. Do you also have a role in education within the region?

A. Yes.

I provided the educational lectures to the lay examiners within the—within our own office and also provided lectures to the medical staffs of the regions that we serve, namely, New Jersey and Puerto Rico.

Q. Do you lecture exclusively on psychiatrict issues?

A. Exclusively.

[32] Q. How many psychiatrists are employed by the regional medical staff?

A. At the present time we have six.

Q. Okay. Do you review all of their work, when they are in turn reviewing the state's agency decisions?

A. Yes. Well, not all of their work. Only if there is a question of a disagreement with the state decision.

Q. Okay.

When you conduct training, what materials do you use to instruct the lay examiners and psychiatrists in the state?

A. Okay. Basically, I use the listing of impairments, and I also use the POMS AND I also use those cases which have been returned to us by Baltimore as—by the third tier review, as examples of how it is being done in the central office. And the other things that I use are educational materials which have been provided by Baltimore when we go out for training sessions there.

Q. Whenever you say "lists of impairments," you're referring to the appendix to the Social Security regulations?

A. Right.

B. That describes mental impairment; is that correct?

A. Yes.

Q. POMS is the Program Operating Manual System; is that not correct?

[33] A. Right.

Q. What is that, briefly?

A. It's basically a—it's basically a set of instructions as to how the listing of impairments is to be interpreted.

Q. Now, the third thing you said you used was tier three reviews.

A. Yes.

Q. Would you describe for the Court what a Tier One Review is and whether a Tier Three – Two Review is and what a Tier Three Review is?

A. Okay. The initial review of any case where someone is claiming disability is reviewed by the state agency. And the state agency based on the medical evidence in the case will either say that this is an allowance or a denial.

A proportion of the state agency cases then go on to a second tier review, which is the regional office, and there are 12 regions. Each region has three or four states under their jurisdiction.

The second tier review reviews a portion of the state cases, some months it's all denials, some months it's a portion of their allowances. It varies.

And we send back to the state any cases where we feel their decision has been incorrect.

In turn, we are reviewed by the central office [34] in Baltimore. This is the third tier review and our decisions are commented upon and returned if the third tier feels that we've not been adhering to the appropriate standards.

Q. It's more or less a funnel effect, isn't it?

A. Yes.

Q. Tier Three Review, Baltimore, reviews a few of your cases?

A. Yes.

Q. You review a sample of the state cases?

A. Yes.

Q. Now, whenever you conduct Tier Two reviews in the region, does that include what are called both quality assurance reviews and pre-effectuation reviews?

A. Yes.

Q. What's the distinction between the two?

A. Basically the quality assurance reviews are what we had been talking about, which was determining whether or

not the state agency decision had been – had been correct. The pre-effectuation reviews are reviews of cases which have not yet had a state agency determination. Not yet – have not yet had their payments started.

Q. Whenever you do a pre-effectuation review, that's of a case where the state agency decided to allow benefits; isn't that correct?

A. Right.

[35] Q. And you review it before the benefits actually commence?

A. Before the benefits are being actually given to the claimant.

Q. Quality assurance review includes both cases where benefits are granted and where they are denied; isn't that correct?

A. Sure.

Q. Okay.

Now, as a psychiatrist, what's your role in conducting these reviews; what aspects of the case do you look at?

A. Basically, we look at the medical evidence and this can be in a number of different formats. In some cases, we have evidence from the patient's treating sources, which may be private psychiatrists. Unusually. May be clinics. May be state or psychiatrict hospitals.

If the medical evidence from these sources is judged to have been insufficient, then the state may have purchased a – an examination by a psychiatrist who will give a mental status on a kind of one-shot basis. So we review all of the medical evidence that is available to us.

Q. Is it within your province to review the severity of the mental impairment that the person has?

[36] A. What we do is look at the medical evidence and then determine what the severity of the impairment is based on the objective findings in that particular case.

Q. Is your determination on a tier two review at least at your level on severity, conclusive?

A. It's only—it's only conclusive if the case does not—is not one of those which is then sent on to Baltimore.

Q. Tier Two, the severity rating is within your province?

A. Yes.

Q. There is nobody else in the region that does that?

A. No.

Q. Okay. Now, it is also within your province to evaluate the residual functional capacity of the individual?

A. Yes.

Q. Okay. Are there any other decisions that you have to make about the case, apart from severity and residual functional capacity?

A. Yes. We have to determine whether from the point of view of the medical evidence, the onset date is appropriate.

Often there is a technical determination. But if it is not, we give our opinion as to whether it's appropriate.

[37] Q. The onset date is when the disability began; is that correct?

A. Yes. When severity was established.

Q. Okay. Anything else?

A. In the cases of those claims which have been ceased, to determine whether the cessation date is appropriate.

Q. Okay. Now—

A. And also, by the way, an important factor is to determine whether there is any facts, sufficient medical evidence to make a judgement.

Q. There are other determinations that have to be made on review of a case, are there not?

A. Yes.

Q. For example, it has to be determined whether the person's vocational factors support their ability to work; is that correct?

A. And you don't actually make the final determination as to whether or not the person is an allowance or a disallowance, do you?

Q. What we do is make a—assess the relevant vocational factors and then it goes—but then it goes on to someone else, to make the final decision, as to whether or not that person is—meets the vocational requirements or does not.

[38] Q. Okay. Who is that someone else within the region?

A. Vocational analyst.

Q. Okay. That's generally within the jurisdiction of what's called the Disability Analysis Branch, isn't it?

A. Yes.

Q. OR DAB?

A. Yes.

Q. The chief of DAB really makes the final decision as to whether this is an allowance or a disallowance; isn't that correct?

A. Yes.

Q. Okay. Now, the Tier Three Reviews that you get from Baltimore are rather important to you, aren't they?

A. Absolutely, yes.

Q. Would you describe how you use them?

A. The way that the review system works is that it gives us an understanding of whether or not—given that particularly in psychiatric cases, but I think this is true in all medical cases, there are issues of judgments involved. I think that was what was meant by climates. There are issues of judgment. It's not absolutely cut and dry.

And the third tier reviews from Baltimore give us an understanding of how cases are in fact being adjudicated, [39] because if our region gets a large number of returns, it means in some way that we are not in line with the rest of the country.

And one of the important things that the disability program has to insure is consistency throughout the country.

So the third tier reviews are important to us in reviewing our own adjustication of cases.

Q. You say if you get a large number of returns, you're inconsistent.

By "returns" you mean the central office in Baltimore saying that your decision was wrong?

A. Yes.

Q. Is that correct?

A. Yes.

Q. What are the consequences for you if you had a large number of cases that were decided wrong?

A. Well, we have a process which is a rebuttal process, which we use and have used a great deal.

You look at the case and give all the reasons why you feel in fact your adjudication was correct. There is a certain point at which this rebuttal process has to end. You send the rebuttal. They send a re-rebuttal. There is a certain point at which it ends.

And then a strike is given against your office, if it—if their decision is upheld.

[40] Obviously, the office for which we work doesn't like an enormous number of adverse—of overturned cases. So there is a pressure for us to be in conformity with the third tier review.

THE COURT: I didn't understand that word. Did you say "strike" or "stripe" against the office?

THE WITNESS: There—every time—

THE COURT: What did you say?

THE WITNESS: Strike, s-t-r-i-k-e. They count the number of adverse returns.

Q. Okay. Whenever—

THE COURT: What does that mean? Is that like a demerit?

THE WITNESS: Like a demerit, yes.

THE COURT: How are you punished for it?

THE WITNESS: Oh, I—the physicians are not because we're sort of free agents. But the function of the

Bureaucrats within the system is to come to the medical department and say, hey, look, we've had an enormous number of returns from Baltimore. We feel that there is something that you are doing which isn't in line with policy. Can you look at this and change it?

Q. Okay. Ultimately, after rebuttal, it's Baltimore, the central office, that has the final say, do they not?

[41] A. Yes.

THE COURT: I don't understand. The bureaucrats tell you how you should exercise your medical judgment?

THE WITNESS: No. No, no, no, no. Basically they say, we are getting a large number of returns on the third tier review from Baltimore. Why is it that there is this disparity between your judgment as a medical staff and the judgment of Baltimore as a medical staff? What's going on?

And there have been a number of memos, passed between the medical staffs, to try to clarify what is in fact going on, why there is this disagreement when there is disagreement. But it comes to the attention of the bureaucrats, none of us.

Q. In fact, the tier three returns are often very helpful to you, are they not, in clarifying the policy of the Social Security Administration?

A. Yes.

Q. How does that happen?

A. Well, there are a number of ways in which we are communicated with the policy makers in Baltimore. One is by education sessions. We go out to Baltimore and receive instructions.

The other is by memoranda, which are typical bureaucratic memoranda and somewhat difficult to interpret [42] very often, and the third way and perhaps the clearest way of all is the actual cases on a blow by blow basis that they feel are being badly adjudicated and this is a very concrete way of letting us know how we're doing.

Q. So in actuality, what that means is, if you get returns of a certain kind of case back and you thought they were allowances and Baltimore said they would be disallowances, you know that the policy is to disallow that kind of case; isn't that correct?

A. Yes.

Q. Isn't that really—because it's concrete, the ultimate source of guidance that you have to use?

A. It's certainly the best, yes.

Q. Okay. Now, as a result of all your work with the Social Security Administration, you're familiar with the standards, obviously, for adjudicating?

A. Yes.

Q. That follows a five-step sequential evaluation process; isn't that correct?

A. Yes.

Q. Would you describe for the Court what the five steps are?

A. Okay.

Well, the—let me talk about the medical steps because basically one is looking at a case to determine [43] whether the medical evidence is sufficient. Having determined that there is sufficient medical evidence, one then determines whether the medical evidence—whether one can rate the impairment on a scale of zero to five, on the basis of the medical evidence. One then provides an impairment rating.

If that impairment rating is greater than two, which is a slight impairment, one then goes on to the next step of the process, which is to determine whether or not the listings are met. If the listings are met, that is, if the impairment is severe and it is a five, then essentially that case is being determined.

If, however, the medical impairment is in the three or four range, moderately impaired, moderately severely impaired, whatever kind of words you want to give to that

scale, you then go on to the next step, which is to assess the vocational factors.

Basically, what we as medical practitioners have to do is give a residual functional capacity. I think it is a lot easier to understand what this is if one talks about it in terms of more concrete organ systems like how much can someone lift, how far can they walk, those kinds of things.

In the psychiatric area it is can someone understand commands, can they carry out commands, can they [43A] interact appropriately with supervisors and co-workers, can they maintain attention and concentration.

[44] BY MR. BERGDALL:

Q. Let me just see if I can break this out. The first thing you have to decide is whether a person has a severe impairmant, is that correct?

A. Yes.

Q. And if they don't have a severe impairment then you don't go any further, isn't that correct?

A. Yes. Okay.

Q. The second thing you have to decide is whether the person has an impairment that is sufficiently severe to meet the listings, isn't that correct?

A. Right.

Q. And then you have to decide as a medical factor what you have just described is residual functional capacity, is that correct?

A. Yes.

Q. Okay.

Now, whenever someone doesn't meet the listings, but goes ahead and is allowed benefits, the term of art that is known by is a medical vocational allowance?

A. Yes.

Q. That is really the only two kinds of allowances you have? Somebody either meets the listings or their medical vocational allowance?

[45] A. No. There is a third type, which is called equaling the system listings, that is when someone has a severe im-

pairment in more than one organ system but not sufficient to meet the listings in any one. And then you can say based on the severity, the combined severity of impairments, the listings are equal.

Q. Is that a common occurrence?

A. No.

Q. It's pretty rare?

A. But it does happen.

Q. Okay.

What are the factors you evaluate as a psychiatrist to determine residual functional capacity?

A. First of all, whether someone is stable of understanding and carrying out simple commands.

Q. All right.

A. You don't want to know how I would look at that? You just want to know what they are, right?

Q. Right.

A. Okay.

The second one is whether they are capable of interacting with their supervisors and with their co-workers in a work situation.

And the third important one is whether they are capable of maintaining concentration and attention.

[46] There is a fourth one, which is whether they are able to work with the public but that is not critical.

Q. My next question is, how do you determine that then? On what evidence?

A. Yes. What one does is one takes the psychiatric evidence and one looks to see how the claimant is performing in an interview situation. Is the person able to understand the questions that are asked of him or her by the psychiatrist? Are they responding appropriately to those questions?

Additional evidence, like did the claimant understand when the appointment was? Did he or she come on time? Were they able to wait in the office? These kinds of things are important, were they dressed appropriately.

Then—so basically, carrying out simple commands is really being able to respond appropriately to questioning, being able to give data about one's name, one's birth date and those kinds of things.

Whether they can interact appropriately, it is helpful, the more evidence one has.

If they are in any kind of clinic program, are they able to interact with the people within that program. Are they able to carry on conversations. Do they have any spontaneous relationships with people outside their immediate family?

Are they able to respond appropriately to someone [47] who is talking to them or do they refuse to respond? Do they—are they involved in some delusional system and not able to focus on what is being said to them?

As far as maintaining concentration and attention, this is actually often very difficult to assess if one doesn't have some longitudinal picture of the patient in some clinic setting where they've been observed over a prolonged period of time.

But are they able to attend to tasks, are they able to complete tasks? Those kind of things.

Q. Okay.

You say longitude history, would you clarify what you mean by that?

A. Okay. It is important to recognize that psychiatric illness is not something that happens today and is gone tomorrow. Psychiatric illness is a long term thing and it has exacerbations and it has remissions. Sometimes patients even with severe chronic psychiatric illnesses can look quite good at one point in time.

The most important thing about a psychiatric patient is obtaining some long term perspective on how this person has functioned, not how he or she functions at one isolated period in time. But how they've been functioning over the past year or even over the past few years. That is what I mean by longitudinal.

[48] Q. Even when you have that, your determination of residual functional capacity is quite frequently just a matter of clinical intuition, isn't it?

A. Yes.

Q. You're not aware of any studies that correlate to any particular studies—any particular symptoms, excuse me, with the ability to work, are there?

A. No. The only studies I am familiar with and this is not my particular area of expertise, as you know, seem to indicate that the best predictor of whether someone can work is whether they have, in fact, worked. And that there doesn't seem to be a very strong correlation between psychiatric symptomology and the ability to work.

Q. Okay.

Getting back to the review process—

THE COURT: Could I, for a minute?

MR. BERGDALL: Certainly.

THE COURT: This is all done on papers, what you have just described? Not by your interviewing anyone?

THE WITNESS: Oh, we don't—we don't actually interview anyone at all. We just have reports. Actually, nobody interviews anyone in this whole process, except the treating person or if there is a need to purchase information by the psychiatrist who examines the [49] patient on the purchase, but the state agency determines on paper. We determine on paper.

Baltimore, the third tier review determines on paper. No bodies.

THE COURT: Do you know the psychiatrist on reputation? How do you evaluate their reports?

THE WITNESS: In the—the state is much too large for us to know each individual psychiatrist. There are some one knows do absolutely terrible examinations. But that is basically one has to look at the quality of the report one is getting in order to determine whether it is adequate enough to make a judgment. Enormous variability in the adequacy of psychiatric reports. If it is not adequate, one writes away for more evidence.

THE COURT: I take it, you don't examine to determine whether the adequately articulated report is congruent with the observations made by the psychiatrist?

THE WITNESS: Oh, no. no.

It is rare that the only piece of evidence one would have on a psychiatric case would be a single report. And what we do examine for is to determine whether the evidence as a whole is congruent.

THE COURT: What is one of the exams that you [50] gave, as I remember, of a person being able to follow commands when the person appeared to be interviewed on time?

THE WITNESS: I didn't say that was the only thing.

THE COURT: No. I said one of the elements.

THE WITNESS: Okay.

THE COURT: The report wouldn't indicate whether that person was taken by hand or carried or—for the interview, would it?

THE WITNESS: Yes, they usually do. A good report will say the patient arrived by himself at the interview on time. Or they will say the patient was brought to the interview by so and so. And a good report, they are asked to provide this information, and a good report will have it.

THE COURT: Is the report made up for this purpose by the treating psychiatrist?

THE WITNESS: Let me—if I can, to just fill everybody in. There are two kinds of reports we get. One is evidence that is submitted by the treating source. Sometimes this is just the hospital records and sometimes it is an actual document which is, in fact, prepared by the treating source, to answer specific questions.

[51] And the other kind of evidence is—that is obtained is a purchase, clinical evaluation. Purchased by the state for the claimant.

THE COURT: Well, I understand that the purchased report would follow the format you have considered desirable?

THE WITNESS Not always.

THE COURT: If you got what you paid for.

But I don't understand the treating psychiatrist. Is he asked on your forms, which a compensation doctor would be asked, to produce a report with all this information that you'd like to have or do you just take his general report, let's say, for the hospital records of the treating physician?

THE WITNESS: Can I clarify one thing?

The regional office doesn't request any kind of reports. The state agency, the initial request reports. They send to the treating physicians a pre-prepared form, which covers the information they would like to have. Sometimes they get it back and sometimes they don't get it back and sometimes what they get is a telephone interview with the treating physician. It is very variable.

THE COURT: But the treating physician knows that he's preparing a report for the purpose of [52] determining disability?

THE WITNESS: Yes.

THE COURT: Does he get paid for this work? Or she?

THE WITNESS: I am not sure whether the state agency pays or not.

THE COURT: I see.

THE WITNESS: We—probably not sufficient to make it worth their while. I don't know whether the state agency pays or not. They pay the purchased examination, but I don't know how the other—

THE COURT: But your impression, I take it, is that these are variable utility to you?

THE WITNESS: Yes.

THE COURT: All right.

BY MR. BERGDALL:

Q. Whenever the state purchases an examination, excuse me, that is called a consultative examination, is that right?

A. Yes.

Q. Often referred to as C/E in documents?

A. Yes.

Q. A consultative examination is always limited to what that psychiatrists see of current symptoms, isn't that correct?

[53] A. Well, no. I mean, they are supposed to take a history. And they usually do. And they'll take a history of the illness, a traditional medical kind of examination. A history, the reason the patient is there and, a history of the illness, the mental status findings at the time of the evaluation and a conclusion.

Q. Okay. And they take that history from—to your knowledge, from the applicant?

A. From the applicant or if that is not possible, from someone who brings the applicant.

Q. Okay.

Now, neither a psychiatrist who is a treating psychiatrist, nor a consultative psychiatrist actually makes a determination on whether or not the applicant has the residual functional capacity for certain jobs, do they? They don't do that?

A. No.

Q. That job is performed strictly by a review physician in the state agency?

A. Yes.

Q. And then performed by you on a paper review, on review, is that correct?

A. Yes.

Q. The state agency, their psychiatrists' review and your review, becomes a part of the record in that case, [54] does it not?

A. Yes.

Q. Okay.

You've had frequent conflicts with both the State Office of Disability determinations and Baltimore Central Office over the standards for adjudication of psychiatric cases, have you not?

A. Yes.

Q. Okay.

Doctor, I'd like to show you what has been marked as Plaintiff's Exhibit 6, which is a letter to Harry R. Pace, dated November 9, 1978, with an attachment which is a memorandum from you dated August 24, 1978. I'd like to direct your attention to the attachment.

A. Yes. Okay.

Q. Can you describe the circumstances under which this memorandum was prepared?

A. Yes.

Having understood the way the tier review system works, what had—what had happened was that the regional office, which was my office, had been overturning a number of New York State denials and reversing them to allowances.

Based on our interpretation of the listings and our interpretations of medical vocational factors.

[55] The state agency, New York State Agency, had protested this and had gone to the third tier review, the central office in Baltimore, to request clarification.

And basically what had happened was that the third tier review had upheld the way that the New York State Agency was adjudicating the cases.

THE COURT: Excuse me. When you say—you used the phrase "third tier review". You mean, a unit, not a process? Like the Attorney General is the third tier review? You used the phrase in two ways. It seems to me. As a process of review and also the kind of an entity that does the review?

THE WITNESS: It is both. It is a—it is an entity. It is a group of people located in Baltimore, whose function this is supposed to be.

THE COURT: I see. So when you say the third tier—

THE WITNESS: But it is also part of a process, which is—which I think has been described.

THE COURT: But as you just used it, you meant the personality? Corporate body?

THE WITNESS: Central office. Okay. I'm sorry. That was unclear.

THE COURT: It is not unclear. I wanted to make sure whether I understood you.

[56] THE WITNESS: Okay.

BY MR. BERGDALL:

Q. Do you know who in Baltimore does third tier reviews?

A. Oh, it's a constantly fluctuating group of psychiatrists. I know who has been responsible over the years for the psychiatric department. But the actual individuals who are involved in it have changed.

Q. Okay.

Dr. Puig, is one of the physicians that is in charge of that?

A. Yes. I don't know how long he's been there. Maybe the last two, three years. Three years, I would guess.

Q. And Dr. Herbert Blumefeld is one of the doctors?

A. He's not a psychiatrist.

Q. He is not a psychiatrist?

A. No. He's an internist who is in fact the medical director of the program. The Dr. Puig's predecessor was one Carl Nussbaum, who was there for eons.

Q. Getting back to the memorandum, essentially you had overruled the state and had in turn been overruled yourself by the central office, is that correct?

A. Yes.

Q. I'd like to focus you attention on the first [57] full paragraph of this memorandum.

We'll go through it and let's see if we can understand it.

The first sentence says those claimants do not meet the listings.

THE COURT: I am not sure I have this. This is Exhibit 6?

MR. BERGDALL: I believe so, your Honor. It is an attachment.

THE COURT: This is the attachment?

MR. BERGDALL: This is the attachment. I'm sorry.

THE COURT: All right.

MR. BERGDALL: It is the attachment to the letter.

THE COURT: You are not focusing at all on the letter?

MR. BERGDALL: I am not focusing on the letter at this point.

THE COURT: All right.

MR. BERGDALL: I jumped ahead.

THE COURT: Dated August 24?

MR. BERGDALL: Yes, sir.

THE COURT: Signed by the witness?

MR. BERGDALL: That's correct.

THE COURT: All right.

[58] Q. The first line says: "These claims do not meet the listings."

I assume you mean they didn't qualify for benefits on the listings?

A. Yes

Q. The second phrase is: "It is also very clear that they cannot work. . ." I know you may not recall the specific cases, but can you describe how you determined that?

A. This is really very difficult and perhaps it would be helpful for me to describe the kind of cases in which these adjudicative difficulties occurred.

These are mostly cases of functional psychiotic disorders of which the diagnostic category would usually be schizophrenia or manic depressive illness.

These are patients very often in whom one finds delusion, hallucination, the kind of things that make it easier to say that the person's absolutely crazies have died down, and it happens with a lot of patients, the floored hallucination begins to die down with the passage of time and what you are left with is an individual who has the basic

underlying symptomology of the disease which is a disorder effecting ability of any kind of an emotional response to people, disorder of attention, disorder of energy and inability to get motivated to get started to [59] engage him or her in any kind of activity.

And you're left with this residual person. This person we know very well from our experience in psychiatric clinics, is really unable to sustain a kind of activity for any period of time.

One wonders often into a kind of highly personal kind of thought pattern, doesn't continue to do any kind of—anything involving inter-action with people.

Basically, not capable of responding to any kind of work situation on a sustained basis. They may do something for a little while but nothing on a sustained basis. These are the people I feel and I think most of us in the system felt were those most poorly served by the way the cases were adjudicated.

The people in whom vocational factors were important but there was no way of assessing them.

Q. In fact, the category of people you described are inflicted with chronic schizophrenia and is a fairly large category of mentally ill persons?

A. Schizophrenia, depending on where you take your statistics from, in terms of the general community, runs about one percent.

Q. Of the whole—

A. Anxiety neurosis four percent, alcoholism, ten percent. I wanted to give you a basic background, in terms [60] of general community, schizophrenia is about the most frequent.

In terms of applications for disability it certainly is a large category.

Q. You felt confident at the time you wrote this memorandum these particular individuals fit into that category and could not work, is that correct?

A. Yes. This is the category we were all concerned with.

Q. The next full sentence reads: "TTR reviews on which one has to base one's decisions do not have any place in which a longitudinal pattern can be assessed."

TTR means Tier Three?

A. Yes.

Q. That was returns from Baltimore?

A. Yes.

Q. What did you mean by there was no place in which a longitudinal pattern can be assessed?

A. This has subsequently changed, but the way in which the severity was rated for any one psychiatric symptom was based on objective findings at the time of the current clinical evaluation.

If someone—it's hard to do it and I don't want to get involved in that kind of verbage which nobody understands—if someone is hallucinating and talking to the voices [61] all the time they are in the interview, they are clearly responding to voices, the person would be said to have a severe impairment as far as hallucinations were concerned.

This is based on current symptomology only. And there is the form which one fills out rating all the patients symptoms which is really based on the current symptomology—are they actually hallucinating.

Q. QED deals only with current symptomology?

A. Yes.

Q. What is the QED?

A. It's a form which consists of a number of symptoms, each of which one has to rate. The initial category covers intellectual impairment and there are ratings for verbal ability, performance ability, for organic disability.

The second category covers people's symptoms such as anxiety, depression, suicidal thought.

The third cateogory measures the patient's contact with reality, which has things like delusions, hallucinations,

non-organic confusion, bizarre behavior. Each of the symptoms one has to give a rating to.

The composite rating constitutes the global severity of that patient.

Q. Dr. Geller, I would like to show you what has been marked in evidence as Plaintiff's Exhibit 3 and I ask you if that is the form you just described?

[62] A. Yes.

Q. Essentially your comments on that in your memorandum was this form only alludes to current symptoms?

A. Yes.

Q. Only if they show up while the person is actually being assessed, is that correct?

A. Yes.

Q. Is that essentially the same form that is known as the psychiatric review form?

A. Yes.

Q. Has that form been in use, in the same form, since 1978?

A. I don't know when it came in. They did a study in the central office to determine what were the important features of the psychiatric examination and came up with this in '77, '78.

Q. There haven't been any major change in the form that you know of?

A. No.

THE COURT: I don't understand. Do you mean that looking at number three, case history, it's just what the Doctor observed at the interview?

THE WITNESS: Looking at—

THE COURT: Form number three—Exhibit 3, form 56382 or SSA2506. What number do you use for this [63] form?

THE WITNESS: QED.

THE COURT: That doesn't include any history given by the patient?

THE WITNESS: Well, the instructions for filling this form out was it was to be based on current objective symptomology. As the form evolved and as the thinking, I think in the central office evolved, there was more emphasis made on longitudinal factors as weighing in the ratings given to the form.

Initially there was a heavy emphasis on current objective symptomology.

THE COURT: By objective, you mean observed?

THE WITNESS: Observable. Not something that was complained of, but something the psychiatrist could see.

THE COURT: Could be observed by the psychiatrist during this examination and not report it by somebody else?

THE WITNESS: Not reported by the patient or by the patient's family but something that could be observed by a medical person.

THE COURT: What if it had been observed some years ago and was in the records, is that included?

THE WITNESS: In determining disability, obviously [64] it's important to take into the account the whole longitudinal history. The question is what weight to give a symptom that occurred ten years ago and was not occurring now.

Delusions ten years ago and now the patient doesn't have them, how do you weigh what they were ten years ago?

The concensus was at the time the form came out a delusion that occurred in the past not now currently occurring would be rated as a 2, which is a slight impairment.

A hallucination that occurred in the past but not now currently occurring would be rated as 2.

THE COURT: The problem I think is with the phrase currently occurring. If the complainant appears and does not show any delusion for three days or two days or a day and the record shows he had delusions, is he currently having delusions?

THE WITNESS: I think that that—

THE COURT: For the purpose of this form, I want to understand.

THE WITNESS: For the purpose of this form, it currently doesn't mean just on this day only, it means within the past month. One rarely has just one piece of evidence from one day only, but what is happening [65] this month, this particular window in a patient's mind.

THE COURT: You can't depend on what the patient said or the family said, just what another doctor said he observed?

THE WITNESS: Psychiatric evidence, it's almost impossible when it's filtered through patients and families in order to try to assure uniformity in the program. It insists on objective evidence that the psychiatric symptoms were happening.

THE COURT: I'm not asking the question out of hostility, I want to understand what is happening. You don't have to justify what you're doing, just explain it.

THE WITNESS: What it means is it has to be more than a patient's allegation that something was so. Some other person, non-interested party, has to actually observe it.

If somebody says I have terrible cardiac pain when I exert myself, you want the person to have a stress test to see if there is cardiac insufficiency.

We don't have any equivalent to a stress test in psychiatry. All we have is a pschhiatric observer that is really basically limited—

* * * * *

[71] On the other end of the scale I think the vast majority we can pretty much agree on. This person doesn't have a significant impairment.

But somewhere in the middle there is a gray area and room for dispute, room for interpretation, where there is

room in many respects for one's personal philosophy on how people can function and what is available in the marketplace.

I think it's a mistake to think there are hard fast rules that you can put numbers to. Certainly psychiatry hasn't reached that stage of actually putting a number on and saying this person can or cannot work. My judgment may be more lenient than somebody else.

One other thing that I think the disability program is trying to do is impose standards in an area which is very difficult to do so.

THE COURT: Is there, however, a medical consensus outside this system where you are addressing yourself to that medical psychiatric history must be considered in determining present capacity?

THE WITNESS: I would think that would be a pretty general consensus for psychiatric cases, yes.

THE COURT: Are there any objective criteria you're going to address yourself to in the medical—

MR. BERGDALL: Dr. Anthony and Meyerson are going [72] to testify at length as to criteria—

THE COURT: They are going to talk about the medical criteria outside of this?

MR. BERGDALL: Yes.

THE COURT: I won't bother you with it, Doctor.

Q. Isn't it fair to say you consider the Tier 3 reviews that you got to be telling you what the rules were in determining mental cases?

A. Yes.

Q. Those rules weren't published in the regulations, were they?

A. No. There are the regulations which sort of are the bare bones of the program and how you interpret the regulations and what we are talking about is how you interpret the regulations.

Q. Certainly the final paragraph of your memorandum on the next page, you state: "Unless it is a reasonable procedure to request a workshop evaluation on these cases which do not meet listings, are moderately severe and ability to withstand stress of competitive work situation is questioned, their medical vocational allowances would be confined to older workers with adverse vocational background."

Isn't that what you understood the rule was as a result of this review?

A. Yes.

[73] Q. And the final sentence there says: I therefore conclude that in younger workers medical vocational allowances are not considered when the impairment is psychiatric."

That is also what you understood the rule to be?

A. Yes.

Q. Having understood the rule, you followed that rule, didn't you?

A. Well, yes. I mean from time-to-time I would try to test the waters to see if it changed, but, okay.

Q. If you flip back to the first paragraph again, I have a few other questions.

The second line of that first paragraph: "However their ages preclude any age vocational considerations."

Would you explain what you meant by that? Why did the age of these individuals preclude medical vocational considerations?

A. Okay, a part of the sequential analysis which we admit in the discussion of it is the consideration which applies specifically to older workers.

In terms of transferability of skills from one type of job situation to another and ability to learn new skills, essentially the program says as you get older your ability to transfer skills becomes less and less. If you are fifty-five years old and you have to learn a new set of routines, one

can say if you are precluded from doing [74] your previous kind of work and you are fifty-five, that might be grounds for a medical vocational allowance.

THE COURT: He just wants to get what you say, not whether it makes sense.

THE WITNESS: For younger workers these considerations apply. So that what I was saying was that vocational—these kinds of vocational factors do not apply to younger workers. What I was basically saying, if you are a younger worker and do not have those factors involved, the chances are very, very good indeed and perhaps I was going far in saying never, that you will not get a medical vocational allowance—if you do not meet the list you have the ability to do so.

Q. The bottom line is really whether the person is unskilled—

A. Yes.

Q. Has limited education, limited work experience—

A. Yes.

Q. You made reference here in your testimony and in your memorandum to the necessity of the workshop evaluation to determine ability to work.

Would you describe what a workshop evaluation is and how it helps you?

A. In a workshop evaluation, which is a rather [75] expensive procedure, I understand, the claimant is put in an actual work facsimile setting for a period of usually a week or so. And that present ability to perform basic work functions of an unskilled nature are evaluated, can they meet production standards, time standards, quality standards? Are they able to carry out instructions? Do they remain in the work setting or do they wander off?

It's basically a longer period of observation. This is expensive to do on an individual basis.

One of the things which I have felt for the Government to do that would be cost effective is actually conduct

evaluations and try to correlate them with the kind of information we have in the file or actually do a piece of research on a large scale.

Most of the kinds of research you are going to hear about later on from the two physicians testifying is research on a small scale.

I think what the Government needs is large scale research to see what the correlation is between psychiatric symptomology, the kind of information we have available to us in the program, and how somebody actually does in a work setting.

Q. Earlier on in your career with the—

THE COURT: Excuse me. If I may, I thought you indicated a few moments ago there was no correlation—

[76] THE WITNESS: There is no evidence, I'm sorry. I was speaking from a scientific point of view. We have no evidence that correlation—

THE COURT: There is a correlation though?

THE WITNESS: Yes, in some ways—if not a one to one correlation—but there is some kind of correlation, sure:

Q. Earlier on in your career with the Social Security Administration, did you ever send a case back to the State agency with a request of a workshop evaluation?

A. Yes.

Q. Did you find it helpful?

A. On the occasions when I got to review the case, yes, it's extremely helpful because it gives you all the information that you do not have from looking at the psychiatric record.

It gives you an idea how somebody has actually functioned in a work setting which is really what it's all about.

Q. Since the time you wrote this memorandum in 1978, have you ordered any workshop evaluations?

A. We were told that workshop evaluations were not necessary and would not—would be a very rare instance, I think the language is, when it would need to be ordered

and I think we should be able to make assessments of some [77] residual functions based on the psychiatric evaluation. And these evaluations were essentially not of any use.

THE COURT: Who told you that?

THE WITNESS: The central office in Baltimore.

THE COURT: TTR?

THE WITNESS: The people who do the TTR. You know, from time-to-time we are summoned to Baltimore for training sessions. It's discussed, what is and what is not done, and the line from the central office is that you can make an assessment based on psychiatric evidence.

THE COURT: What happened if you asked for one of these, would it be given?

THE WITNESS: I would ask, the State agency would collect together, half dozen cases and say: look at what the regional office is doing, requesting workshop evaluations, and Baltimore would say, sorry.

THE COURT: Order you not to do it?

THE WITNESS: Yes.

THE COURT: When you were told they are not necessary, what they are really telling you is ordering you not to do it?

THE WITNESS: Yes.

Q. You continue to have some disagreement with Baltimore on these issues even after 1978, didn't you?

[78] A. Yes.

Q. The position you described as the Tier 3 Baltimore position continued to be followed?

A. Yes.

Q. I show you a copy of what is marked as Plaintiff's Exhibit 12 in evidence, a memorandum from Dr. Puig dated March, 19, 1980.

[79] THE COURT: Excuse me just a moment, Doctor. It's about ten after one Eastern Standard Time. I have to leave at 3:15. I would like to know if you want to take a short break now and then come back—

MR. BERGDALL: Direct will be finished in about ten minutes.

THE COURT: How long will the cross take?

MR. KOOLYK: I estimate about fifteen minutes.

THE COURT: What do you want to do, do you want to sit straight through—

THE WITNESS: I would like to sit right through.

THE COURT: Proceed.

Q. Have you seen that memorandum before?

A. Yes.

Q. Can you describe the circumstances under which it came to your attention previously?

A. It was once again and adjudicated problem between ourselves and New York State which had—which had generated a request on the part of the state agency for clarification as to what—I'm looking to see if this is the Puig memorandum.

(Pause.)

A. (Continuing) We had some dispute with New York State agency and basically requested clarification from Baltimore exactly what do you mean. This is what we got.

[80] Q. What was the nature of the clarification? Did it arise out of a conflict between yourself and the State agency or central office again?

A. Yes, it was really with our concern as to how one was supposed to be possessing residual functional capacity.

Q. In fact, does this arise out of another set of circumstances where you reversed some cases and the State agency went to Baltimore and they decided to set you straight?

A. Yes.

Q. And the thrust of the memorandum was to explain the use of the psychiatric review form; is that correct?

A. Yes.

THE COURT: Who is the acting chief consultant in psychiatry and neurology?

THE WITNESS: That was Dr. Puig. It was basically the same situation that occurred in 1978.

Q. Turning to the final paragraph of this memorandum, the statement is made: "In the mental disorders, at least, a total psychiatric impairment rate of less than five signifies the ability to engage in SGA at the level of unskilled work or higher."

SGA means substantial gainful activity?

A. Yes.

[81] Q. The rating of five means the person meets the listing of impairment—

A. Yes.

Q. The statement means if a person did not meet the listing of impairment as measured by the psychiatric review form there should be disallowance?

A. Yes.

Q. That effectively restated the rules that you thought had been followed since 1978, didn't it?

A. It restated actually in much stronger form than it had been stated before.

Prior to that one thought there were pretty—might be occasional exceptions but this was a far stronger statement than one had before or along the same general lines.

Q. To your knowledge was this policy followed in the state agency in New York and within region two after this time?

A. Yes. We certainly tried various ways of getting around it in the sense, as you know, everything is subject to interpretation and we tried to make cases meet the listing where previously there might have been some doubt, but basically we followed this policy.

By the way, we got a lot of third tier reviews that buttress this policy. We got cases back saying you did wrong.

[82] MR. BERGDALL: One moment, your Honor.

(Pause)

MR. BERGDALL: I have no further questions.

CROSS-EXAMINATION

BY MR. KOOLYK:

Q. Do you have your August 24, 1978 memorandum in front of you?

A. Yes.

Q. What exhibit number is that?

THE COURT: Six.

A. Six.

Q. The patients described in that memorandum, were those schizophrenic patients?

A. I can't really recall. I would imagine so, just because they were the cases on which there was usual basis for disagreement.

Q. In discussing your disagreement with the psychiatrist in Baltimore, TTR psychiatrist, was it their position, in their medical judgment, the types of patients you were dealing with could in fact work?

A. Yes.

Q. Did they explain their basis for that position?

A. (No response.)

Q. To you.

A. We had several discussions along these lines and [83] they're contention was that even though it might be very difficult for someone to find a job in the economy and difficult to maintain a job because of competition and other people more adept might be hired, we weren't concerned with those issues, we are concerned with, if someone was able to cary out the function—and these people were.

Q. Did you discuss this issue with psychiatrists in the New York State agencies?

A. Yes.

Q. Did you discuss the issue with Dr. Theodore Cohen?

A. Yes.

Q. Can you describe who Dr. Theodore Cohen is within the program?

A. Dr. Cohen is the chief psychiatrist in the New York State agency and he functions as the quality assurance reviewer for the psychiatric cases, reviews a percentage of the New York State psychiatric decisions, and determines whether quality standards are being maintained.

Q. Did you come to an understanding as to what his review was on this question of whether these types of patients you were dealing with could in fact perform the unskilled work –

MR. BERGDALL: Objection.

THE COURT: Overruled.

A. Could you ask that question again?

[84] Q. Did you come to an understanding what his review was on the basis of your disagreement with the Baltimore psychiatrists?

A. Are you asking about his view as a functionary in the system? I can tell you the latter, he was concerned that we have some uniform process between the state and the regional office so we didn't spend our time squabbling. That is so we can agree on the basics.

I think his personal views are somewhat irrelevant.

Q. With respect to your discussions with the psychiatrist in Baltimore, can you comment on whether they were telling you that your rating of these people, probably can't work, but the program isn't designed to give them benefits, or are they telling you these people can work?

A. They are telling me somewhat like Candide, in the best possible world these people can find employment and sustain employment, basically they do have the capacity in some fantasyland of getting and maintaining employment, yes.

THE COURT: I didn't understand the answer.

Will you read the last answer.

(Last answer read back by the reporter.)

THE COURT: When you say "fantasyland," TTR's, not of the complainant?

THE WITNESS: Yes. TTR. They are saying these people can work. And the considerations made by me, [85] a psychiatrist, who feels they can't work are extraneous considerations as far as their actual mental status is concerned.

Q. You use the word "fantasy," is it a fantasy anyone can work, can get a job, is that the fantasy? Anyone capable medically or psychiatrically can work and find a job and hold a job?

A. I think that in order for these people to work they would have to one, find a job; and two, find an employer incredibly patient and able to overlook a great deal of difficult behavior, and yes, if they can find the ideal working situation, maybe they can work.

I think where we are having an area of disagreement about is really only partly medical.

Q. Is it your understanding the process of obtaining a workshop evaluation that one inform the applicant that he's going to be evaluated to see if he can work and if he fails he's going to get benefits and if he does not fail he's going to be in the same situation he's in now?

A. I hope they don't do that.

Q. Isn't that what you anticipate in workshop evaluations, if you fail you can get benefits, if you don't, we are not going to do anything for you, you're just back where you started from?

A. I would doubt very much if it would be expressed [86] in that form anymore than saying if you're crazy enough you are going to get benefits and if you are not you won't.

If you tell someone as part of the process we would like you to appear at such and such a place where people will be looking at your behavior over a period of a week –

Q. As a psychiatrist do you believe you have any expertise in assessing someone's mental state from finding that a mental status examination?

A. Yes.

Q. What about a workshop assessement, are you able to determine whether the tasks are faked—cannot be seen?

A. If you have someone who is really very good and persistent at faking, you can fake almost anything, sure. It would be a rare person that has that kind of talent to fake on a persistent basis. It requires some skill to do that.

I'm not saying that psychiatrists can't be fooled and workshop evaluators cannot be fooled. That doesn't mean we should not undertake an evaluation.

Q. Do you believe over the past several months the cases are being handled in the same way as they were two or three years ago?

A. No, radically changed.

Q. Can you describe what the change is?

[87] A. Well, the cases we are getting from New York State have many, many more medical vocational allowances, approving them and have been no returns so far from TTR.

Q. When did this change come about?

A. I would say it's been at least six to eight months. It's hard to exactly say when it started happening. But it's about the time of the previous case.

THE COURT: Previous what?

THE WITNESS: Case.

THE COURT: C-a-s-e?

THE WITNESS: Yes, c-a-s-e.

When was that? December, I think.

Q. You're talking about the Minnesota case?

A. Yes.

Q. In your letter of August 24, 1978, you talk about cases which in your opinion the applicant clearly cannot work but his being denied benefits, is that still happening in 1983 in New York?

A. No.

MR. KOOLYK: I have no further questions.

REDIRECT EXAMINATION

BY MR. BERGDALL:

Q. Whenever you say there are certain people who are denied benefits might be able to work in some fantasyland, you meant where there is no stress from the work?

[88] A. Yes.

Q. Whenever you're talking about changes taking place in the last six or eight months, has that been accompanied by any change in the standard or written directives that come from Baltimore?

A. Not a thing.

MR. BERGDALL: I have no further questions.

THE COURT: Thank you very much, Doctor.

* * * * *

[245] B E A T R I C E B R A U N,

called as a witness, having been first duly sworn by the Court, testified as follows.

DIRECT EXAMINATION

BY MR. GLICKMAN:

Q. Dr. Braun, are you a medical doctor certified to practice in the State of New York?

A. Yes, I am.

Q. What is your specialty?

A. My specialty is psychiatry.

Q. Where did you get your medical degree?

A. I got my medical degree from Marquette University School of Medicine in 1949.

Q. Where did you continue your medical training?

A. I did a rotating internship at St. Vincents Hospital in New York, and then practiced as a family physician, general practioner, for about 20 years. And then went into a residency in psychiatry.

Q. At what point did you go into a residency in psychiatry?

A. In 1970.

Q. How did you continue your medical training from that point?

A. I had my residency in psychiatry at Harlem Hospital, in New York. Then at Manhattan State. And I finished [246] up at St. Vincents Hospital and Medical Center in New York.

Q. At—in what year?

A. In 1973.

Q. What is your present professional position?

A. My present professional position, I'm an attending psychiatrist at St. Vincents Hospital and I'm also the founder and director of preventive treatment unit at the hospital.

Q. How long have you held that position as the head—

A. Since 1975.

Q. What was your prior position?

A. Prior to that, from '73 to '75, I was in the outpatient department at St. Vincents, and I was also in private practice of psychiatry.

Q. Do you have teaching experience in psychiatry?

A. Yes, I have.

I was a clinical instructor at New York Medical College from '75 to '80, in psychiatry.

Q. Do you belong to any professional organizations?

A. Yes. I'm a member of the New York State Medical Society, Westchester County Medical Society. I belong to the legislative committee there. I'm a member of American Psychiatric Association. And member of the executive council of the Westchester District Branch of the American Medical Association. And I'm also on the Board of Directors of [247] Partial Hospitalization.

Q. I would like to introduce Dr. Braun's curriculum vitae.

Let me show it to you.

A. Yes.

Q. Do you recognize this document?

A. Yes, I do.

Q. Is it your curriculum vitae?

A. Yes, it is.

Q. Is it accurate?

A. Yes, it is.

MR. GLICKMAN: I move that it be marked into evidence.

THE COURT: All right.

THE CLERK: Plaintiff's Exhibit 55.

(So marked in evidence.)

THE COURT: 55.

Q. Dr. Braun, can you describe the work of the preventative treatment program?

A. Yes. This is a program which was begun in 1975, to care for the chronic mentally ill patients.

Q. How large is the staff?

A. We have 17 clinical and three clerical workers. Among the clinical people there are two psychiatrists, four psychiatric nurses, three psychiatric social workers, [248] four activity therapists and three mental health technicians.

Q. Can you describe the services and care provided to the residents?

A. Yes. This is a day program and it functions five days a week from 8:30 until 3:00 in the afternoon. And the patients each have an individual treatment plan so there are many levels of services depending on what the patients can engage in.

Probably the lowest level being activities of daily living and we teach them how to prepare a meal, how to wash their clothes. We have a shower and try to help them with grooming, mending, taking care of the ordinary things of living.

We also have recreational activities and craft activities for them and then—and also psychotherapy and medications, psychiatrists administer.

And then as they begin to get better, we have—and for those who can tolerate it, some never get better, that better, we do have various pre-vocational activities and gradually moving them into some type of vocational activity.

Q. What is the goal of your program?

A. The goal of the program partly comes from its name, Preventative Treatment Unit. We're really trying to prevent rehospitalization. In this illness every time [249] a patient relapses and is hospitalized, they come out again functioning a little bit lower than they went in.

So it's very important to try to stabilize them and we're also trying to prevent crisis in the community because of their bizarre behavior and so forth. We are trying to get them accommodated to living in the community. And the community to tolerate them.

Q. What is the average number of patients treated at any time?

A. We usually run between 90 and 100 census. We had 93 as at the end of October.

Q. Can you describe for us a typical patient?

A. Yes. In this program, typical patient would probably be a young, in their 20's or 30's, male patient. Because we have a long waiting list, we try to pick the patients who are most severely ill and who but for being in a day program would probably be in a state hospital. So we have the more severe group.

These patients are usually quite well educated. Most are high school graduates. Some are college graduates and some have had some graduate school before the onset of this illness. So often their illness has had it onset in college and they'll be hospitalized and recover from the first acute episode perhaps return to college. Not function quite as well as they did before. Break down [250] again and be hospitalized and maybe leave college and get a job for a brief period and jump around from one job to the other in

and out of the hospital and gradually deteriorate until they need this kind of programming.

Q. They are generally younger workers, or younger persons?

A. Yes.

Q. Are they usually maintained on medication?

A. Yes, they are usually maintained on medication.

Q. Does the medication totally eliminate all of their symptons?

A. No. The medication is pretty good at eliminating what's called apositive symptoms, which are delusions, hallucinations, bizarre behavior, confused thinking and so forth,

But sometimes makes even more evident the negative symptoms which are sometimes mistaken for laziness, which actually are symptoms of schizophrenia, namely, apathy, withdrawal, lack of motivation, negativism. The inability to perform behavior as opposed to performing bizarre behavior.

Q. What kind of work experience, if any, did these patients have?

A. Some have had a little work experience early on. Their typical work history is usually that they don't [251] stay in a job very long. They lose it. They are fired because they don't come or because they get into an argument with other workers and they can't be tolerated. And—but by the time we have them, they usually have not worked for quite a while.

Q. Is this a result of their negative symptoms which you described previously?

A. Yes, yes.

Q. How did these patients find out about the Preventative Treatment Program?

A. I think it's fairly well known in Westchester County because many of the so-called day hospitals are geared to short-term stays, whereas this program was set up for the chronic patient and is quite well known and they've come

from the in-patient services of many of the hospitals, also community support system case managers. We do maintain a waiting list all the time, because most of them come in and are not able really to move out of the program. We have about 24 of our present, 93 have been with us five years or more. It is a long-term program.

Q. Despite their sever mental illness, are many of the patients in the program able to get to the program daily by public transportation?

A. Some come by public transportation. There are a few who drive their own cars. A great many of them, [252] the majority, however, come by taxi which is Medicaid funded because they really can't manage public transportation.

Q. Are the patients in the program generally receiving Social Security benefits?

A. Yes. There are, I think, 78 of them receiving Social Security benefits. And that includes—somewhere I have a breakdown of that. We have 43 on SSI, 25 on SSDI and ten on both.

Q. In the previous year, 1982, how many of the patients were aquiring benefits, approximately?

A. I would say probably close to the same number. Really didn't figure it for '82. That's the number at present.

Q. Did any of these patients who were receiving benefits have their benefits denied to them by the Social Security Administration?

A. Yes. In over—over the years from mid-1980 until the present, we had 25 cases come up for review. Eighteen of them were terminated, which is a 72 percent termination rate.

Q. Do you know what the stated reason for the denial of benefits was?

A. The reason was that they could engage in substantial gainful activity. That was Social Security's reason.

Q. As a result of their receiving these notices [253] of termination, were their symptoms and treatment affected?

A. Yes.

Q. Could you describe how?

A. They—they became very upset. We've tried to refer them—very hard to shield them from us realizing they're very sensative to this kind of thing and very, very fearful of authority and of not having any means of support and so forth. So we've tried to help them to realize that we were going to fight with them and we would go take them all the way through appeals, if necessary. But in spite of that, many of them, we had one who was—first hospitalized after 15 years he had not been in a hospital until he got into the Social Security situation and had to go through to appeals and he just couldn't manage through that length of time. Because being very nervous about how it would come out.

Several others were hospitalized that hadn't been hospitalized for a long time. So it definitely adversely affects their illness.

Q. You would attribute this deterioration to the denial, the initial denial of benefits?

A. Yes. To distresses that are involved with it.

Q. This effect was despite the fact that they later may have gotten benefits either through appeal to the Administrative Law Judge or District Court level?

[254] A. Yes.

Q. Of these 18 patients who were denied benefits, what did you next do? Did you appeal for them?

A. Yes. We have appealed them all and they have all been reversed. I think between our reviews and our new patients we have two still pending, but otherwise they've all been reversed.

Q. What records did you file?

A. We filed everything that Social Security asked for, such as their form that they send out and also all hospital discharges. Anything else that we thought would be helpful, psychological testing, all kinds of forms. In the

early days they did have a residual functional capacity evaluation. That was later cut out, but we filed that as long as they were accepting it.

Q. What was the conclusion of what your records showed with regard to their ability to participate in substantial gainful activity?

A. From my reading of it, I certainly would not have felt that any of the patients could engage in substantial gainful activity. I think that was evident from the records and certainly the Administrative Law Judge felt the same thing as they really looked over the records.

(Continued on next page.)

[255] REDIRECT EXAMINATION

BY MR. ZWICKEL: (Continued)

Q. Did you also have patients who were first applying for benefits?

A. Yes, we did. We had 19 apply for benefits. 15 of them were denied.

Q. Do you know why they were denied?

A. For the same reason; that they could engage in substantial gainful activity and therefore couldn't have benefits.

Q. What did you do for these people?

A. We appealed those also; and they were also all reversed.

Q. In your opinion, could these people work?

A. No.

Q. From your experience in running the Preventative Treatment Program, what factors would you consider in deciding, as a professional, in deciding whether a patient can function in the work world, and is ready to move on to sheltered workshop, and then on to the real work world?

A. Within the program, we try to move in that direction, and we see how well the patient understands directions; whether they can complete tasks; whether they can come every day and stay there during the day. We evaluate those things eventually.

We have a more formalized method of evaluating [256] their possibilities for going to workshop, called the micro-TOWER testing. So that we have a regular stepwise progression, until we would feel that they were ready for sheltered workshop.

Q. Could you describe the micro-TOWER testing?

A. Yes. Micro-TOWER—TOWER stands for Testing Orientation to Work Evaluation in Rehabilitation.

And it is—it's a work evaluation that was developed, I believe, by the Institute for the Crippled and Disabled, and our vocational rehabilitation counselor—I think I forgot her among the clinical staff; terrible. She administers the test.

It can be done in two weeks. However, she usually does it three times a week for four or five weeks. Again, keeping it at a lower stress level for these patients.

It involves various types of work things. For instance, they put together a lamp; and it's very structured so they are given the instructions; certain length to see how far they can get with it.

And there are various types of tests which are geared toward different kinds of work that people might be able to do. Because sometimes they can do one thing and not another.

Q. Is it easy to fake that kind of a test? In other words, can the patients pretent to be able to work when they're [257] not?

A. No. I think that would pick up whether or not they really could work. Because they also are not judging just on what they're accomplishing, but on what—whether they got there or not, and whether they can stick at the task; and a lot of other things of that kind.

We feel if they're able to go through that and do well, and not very many of them are, that they then are ready for sheltered workshop trial, which would be a longer period of time.

Q. How important is the reaction to stress to these patients' ability—to determining these patients' ability to work?

A. It's extremely important. I think constantly in the program we're trying to titrate their stress, as one would do in a chemical reaction; put a drop of this and a drop of that to just make it come out even.

We're trying to have them have a little bit of stress to encourage them to move ahead, if they can. And yet, we have to be very careful not to put too much stress, or they go backwards and relapse.

Q. What is your experience with putting people into sheltered workshops? How do they react to that; your patients?

A. We haven't been able to get very many that have. I think we probably have a very severely chronically ill group [258] of patients; and we really have had very few who have been able to go even to sheltered workshop.

I would say we probably get two a year, and sometimes they go for several months and then they relapse and are back, and not able to continue. So, it's--

Q. Do these people who cannot react to stress, these patients who cannot react to to stress, do they exhibit all the florid symptomatology of schizophrenia?

A. No. Not unless you put stress on them, and then of course they will. They will return with the same symptomatology usually that they broke down with in the first place.

If you're careful about the stress, then they do not have those symptoms. They may appear fairly well when you first see them.

Q. From your experience, does the ability to perform household chores accurately reflect whether someone is—whether a patient is able to work?

A. No, it doesn't. Because household chores can usually be done when you get to them, and so forth.

But that's really not an accurate kind of—there are so many other elements that go into being in the competitive workplace that that would not be an accurate assessment.

Q. How about drive a car?

A. No. That again is not an accurate assessment. [259] That shows a certain amount of ability to concentrate, and so forth. But someone who can drive a car may be someone who is very lonesome; really can't tolerate people around them at all. It doesn't have either too many other things that are involved in working.

Also, driving a car doesn't mean that you have to be somewhere at a certain point. There are a lot of different skills that are involved in being able to work. And many of these things are just one of them. That you really need a whole composite picture to really have somebody who is functioning well enough to work.

MR. ZWICKEL: Okay. I have no further questions.

MR. KOOLYK: No questions.

THE COURT: Thank you very much, Doctor. That will be all.

THE WITNESS: Okay.

(Witness is excused.)

* * * * *

[419] PEGGY LYONS, called as a witness, having been first duly sworn by the Court, takes the witness stand and testifies further as follows:

DIRECT EXAMINATION

BY MS. ZAGER:

Q. Miss Lyons, where are you employed?

A. At Transitional Services for New York, Inc.

Q. And what is your educational background?

A. I'm a nurse with a masters degree in psychiatric nursing from Adelphi University.

Q. After you got your degree, what is your work [420] experience?

A. I have been a registered nurse for 10 years, and for nine years working in the field of mental health.

I worked for Hillside Hospital, which is a psychiatric hospital, part of Long Island University, for six years; inpatient units in the day at the hospital.

For the last three years I have worked at Transitional Services as the director of the Supportive Apartment Program.

Q. What is Transitional Services?

A. Transitional is a residential program that works with people with severe and chronic mental illness, in order to help them to function at the highest level that is possible and ultimately to live in the least restrictive setting that they're capable of managing without becoming psychotic. As much as possible, to try to keep the clients out of the hospital.

Q. Are all the clients individuals with diagnosis of chronic mental illness?

A. Yes.

Q. This includes both schizophrenia and manic depressive illness?

A. Yes, and a couple of other categories. But primarily I'd say 90% of the people are schizophrenics and manic depressives.

[421] Q. Are all your clients on medication?

A. Not every single client, but 99% of them are; almost all.

Q. Could you describe a typical client?

A. A typical client is a person who has had several hospitalizations, usually for several months in an inpatient unit, for psychiatric reasons.

Typically, they have been acutely psychotic during the hospitalization, and had hallucinations and delusions, and after chemotherapy and therapy in the hospital, come to our program; where they live in a supervised setting, and are helped through various programs to get out each day; to learn how to cook and take care of themselves, to dress, and to a certain extent to interact with other people.

They are usually quite limited in all areas of living and functioning.

Q. How is Transitional Services structured?

A. It's structured in—with three different components or phases in the residential program; so that the person comes into the entry level phase, which is a dorm-type setting with staff supervision 24 hours, and begins to get oriented to transitional; learns basic ADL classes and skills, which are activities—

Q. Excuse me. What is ADL?

A. Activities of Daily Living; which include dressing, [422] shopping, budgeting, cooking, meal planning, using public transportation. Things like that.

Q. And the next phase; I believe it's phase 2?

A. Right. And then when they no longer require constant supervision and they're able to live in an apartment where they're required to shop and prepare their own meals, they go to phase 2, which is also a supervised setting, except that the staff reside in an apartment on site, rather than being a large half-way house type facility which is what phase 1 is.

Q. When you were describing phase 2, you said that they had to be able to live in an apartment and shop and prepare their own food.

Is that something they have to have accomplished already in order to move into a phase 2 apartment?

A. They have to have some very basic skills in that sense, because in phase 1 the meals are prepared, and the clients just eat in the cafeteria.

In phase 2 they live with two or three other clients and have to be able to prepare some kind of meals and survive.

The whole process of learning these ADL skills continues throughout the whole three phases.

Q. And what is phase 3?

A. Phase 3 is the Supportive Apartment Program, which [423] is what I am involved in; that those are apart-

ments scattered throughout Queens, where we're located, where the clients are not under direct staff supervision.

They live with two other clients, and the counselors visit them three times a week in the apartment, and see them individually as often as it's required, and provide hostess services.

Q. How are the three phases related? Is it sequential?

A. Right.

Phase 1 is the entry level phase where all clients begin the program. And as clients progress, and are capable of living and, for the most part, remaining somewhat stable with less supervision, with less support, they gradually move to phase 2, and then to phase 3.

However, for most of our people, it's not a clear cut course from 1 to 2 to 3.

More often people begin in 1, and at some point graduate to 2 and very often have to return to phase 1 or to the hospital during the course of their stay at Transitional.

Q. In addition to the apartments, the residential component of Transitional, are there any other specific services or programs that Transitional Services provides?

A. Yes. There is a vocational component and there is a socialization component. There is another Transitional in the Bronx, another residential program. And there is a [424] program called Hope House for the multiply handicapped.

Q. As part of the residential program, what kind of counseling or services do you provide your clients?

A. Well, towards the end of trying to help people function as well as is possible, in the various areas of their lives, which includes interpersonally and socially, vocationally, and in terms of psychological functioning and living skills, what is provided is a combination of group classes on these various skills; individual sessions to help practice with cooking or shopping, whatever the thing is; frequent counseling sessions, group and individual, both to help people to sustain whatever level they're functioning

on, and also to evaluate them in terms of a possible worsening of symptoms, and the need for emergency evaluation or for hospitalization.

And also there is a general assistance in making plans around vocational issues and living arrangements called case management.

Q. Do you encourage your clients to seek work?

A. We encourage many, many of our clients to seek work or, in the sense, to work at a more independent level than they are now with more responsibility than they have at present. And when it's feasible.

More to the point, though, I think we try to encourage people to function at the highest level that they're [425] able to.

So, for many people that is—that does not include employment of any sort. But it still represents progress and growth for that person.

Q. Turning now to phase 3 in particular, the phase that you are the director of; what skills must a client have in order to function at all in phase 3?

[426] A. The person must be able to live in an apartment without, certainly, hurting themselves, or certainly hurting another person such as their roommate or somebody else in the community; without being violent; must be free enough from psychotic symptoms that they're not going to be in danger in any way while they're trying to get to their program or travel; they're not going to elicit hostility from other people in their travels.

And they have to be able to have basic skills in terms of living in an apartment, which are the things I mentioned before; feeding themselves and all that is involved in that, and keeping the apartment itself reasonably safe and clean.

Q. And what skills to you try to develop in phase 3?

A. All of those skills are ongoing issues for the people that we work with, in the sense that they're rarely mastered. And we keep trying to help people improve at them and do better.

And usually as they're working on one thing, one area, very often something else slips for a while. So those are some of the skills that we work on.

Also we work to a large extent with trying to help peoples' ability to cope in a psychological sense, to understand the nature of their illness a little bit, to be able to recognize, or at least signs of deterioration, something [427] going wrong; and to be able in general to tolerate frustration a little bit better, manage their impulses a little bit better, and get along with people in a better way.

Q. What is the average length of stay in phase 3?

A. It's hard to pinpoint an average, because the agency is eight years old. There are people who have been in the agency since it began eight years ago.

I would guess that people stay around three, four years in phase 3; longer than they stay in phase 1 or 2, because the transition from phase 3 out of Transitional altogether is a much harder step for them to make. Some people stay five, six years.

Q. Is that stay continuous?

A. I don't understand your question.

Q. Are they in phase 3 throughout that five year period?

A. Right. Except for the times when they might go back to phase 1 for an emergency evaluation, or for more observation during a crisis period, and at times when they return to the hospital.

Q. How often does that happen?

A. It's quite frequent in the course of being at Transitional that a client will return to the hospital.

But of the clients I'm working with now, about 40% have returned to the hospital, repeatedly, during their [428] stay at Transitional; and at least 2/3rd's have gone back to phase 1, occasionally phase 2, during different periods of their stay in phase 3.

Q. So, if I understand you correctly, the clients in phase 3 who have attained a greater degree and development of skills, still often have to return to the hospital?

A. Right. Because of the nature of the illness, the clients experience periods of deterioration frequently, either spontaneously or in response to a stressful situation in their lives.

And it's not uncommon that people decompensate and become psychotic, have to go back to phase 1, where it's possible we try to work with them to stay out of the hospital; where they're in any kind of danger or we can't provide enough support for them, we return them to the hospital.

Q. Where do clients go when they leave?

A. It all depends. The kinds of individuals we work with, although they all have chronic and very serious psychiatric disorders, have different levels of development; and there are some individuals that we work with that are capable of going to their own apartments or sharing an apartment with friends.

There are others that go to similar supportive apartment programs on a long term basis, or even more [429] restricted settings, such as adult homes. Occasionally, people to the hopsital.

Q. Do any of the people currently in phase 3 have full time jobs?

A. Have?

Q. Full time jobs?

A. Yes. Right now three individuals have full time jobs.

Q. Did they have these jobs prior to entering phase 3?

A. No. They've all gotten them within the last couple of months.

Q. And it's three out of how many clients?

A. There is—we have 40 clients. At present I think we have 37 or 38 clients, but we have a capacity for 40.

Q. In phase 3?

A. In phase 3. Each phase has 40 clients.

Q. How long did it take them, these three people who have jobs, to find jobs?

A. Well, they've been in Transitional generally for several years, by the time that they reach phase 3 and find employment.

And that is usually after a long period in working in pre-vocational programs, to help them develop the ability to work; things like attendance and punctuality; being able to [430] deal with people without becoming excessively anxious.

Q. Deal with people—you mean their peers or supervisors?

A. Meaning to be able to be around co-workers, supervisors, and handle it in appropriate fashions—that they are employable. And also so they're not so overwhelmed that they respond to it by becoming sick again.

Q. Approximately how many hours a week do phase 3 clients spend in therapy, counseling, or other activities with people who are trained to work with mentally ill clients?

A. Again, it depends on which individuals you're talking about.

Many of our clients are in day treatment programs or day hospitals, or pre-vocational programs which emphasize those skills that I mentioned in terms of following a structured schedule and relating to people, and behaving, dressing properly; handling stress and anxiety.

Those individuals probably were in contact with helping professionals for 30 to 40 or more hours a week, because in addition to the—probably more like 45 or 50 hours. In addition to the program they're in, almost all the clients go to individual-group therapy once or twice a week, and see the counselors from Transitional three or four times a week. So, for those individuals, there is a lot of time spent with helping people.

[431] Q. What are your duties and responsibilities as phase 3 director?

A. As the director of the phase, I'm responsible to coordinate the administrative and clinical running of the program, of the apartment program.

So, to do that, I supervise a staff of seven counselors in their contacts with the clients, and I work with all the counselors as a team, because we need to be there when the clients are there, regardless of who in fact we're working with.

And I also assume primary responsibility for any of the clients that are in crisis, or in the hospital or have returned to phase 1. So I work directly with them and, whenever possible, together with their original counselor.

Q. Have any of your phase 3 clients applied for Social Security benefits?

A. Yes, many have.

Q. As part of your responsibilities as phase 3 director, are you involved in any way with their claims?

A. Yes.

As the counselors are working with their individual clients, I also work with clients who are going through the process of trying to apply for Social Security, or trying to continue on it.

I get involved in terms of helping people follow the procedure. Marguerite Murphy advises us as to the steps of [432] the procedure that we're up to, what is needed for that individual client.

And we wrote psycho-social summaries for clients when they go to ALJ hearings, and represent them at the hearings.

Q. What is involved in writing a psycho-social summary?

A. It includes contacting their therapist or psychiatrist, if the person is seeing both; contacting their vocational or pre-vocational counselor, or the program that they're attending. And from both of those sources, trying to get information as to how they're functioning on a day to day basis in those settings.

We also use own observation of the clients' functioning in the apartment, in the individual contact we have had with them, and extensive interviews with the client himself or herself, to try to put together a picture of the person's past history, family history; the details of the illness itself and the current functioning.

Q. At what stage in the Social Security application appeals process do you write a psycho-social summary of someone?

A. At the point where the person has been cut off from SSI funds and is going to an ALJ hearing.

[433] Q. Either cut off or denied benefits, if it's an initial application?

A. Right.

Q. Have you attended hearings for administrative law judges?

A. Yes.

Q. How many have you attended?

A. Probably about six or seven.

Q. And what do you do to prepare for those hearings?

A. In terms of the clinical information for the client? I'm not really—

Q. When you attend the hearings, do you testify at those hearings?

A. Yes.

Q. And how do you prepare yourself?

A. In the same way that we have prepared for the—putting the report together; the psycho-social summary.

We gather all the information from all the people involved in that person's life and the person themselves, and from our charts which have current and past records; and present that material to the Judge.

Q. From your personal experience, how does the Social Security application and the appeals process affect phase 3 clients?

A. What I've noticed is that it's a very upsetting [434] experience for many people. It's long and drawn out; it sometimes takes several years to be resolved. It evokes a lot of problems and issues for the people themselves.

Most of our people really want to work, even though they're not capable of it now; may never be. But they feel somewhat ashamed and embarrassed that they have to be receiving funds.

It's pretty traumatic to sit down and in an interview describe all the problems that face you now; all your history of hospitalizations; the kinds of problems you had at times when you were psychotic.

Q. And they do have to do this a part of the process?

A. It's part of presenting, pulling together the information in the most coherent way—is to go over it with the person themselves and to clarify things that might not be available in the chart; things like that.

Q. Could you give us an example?

A. Of somebody in that situation?

I worked with a young man—I worked with several people in that situation who have been very upset by the process. One of the people, a young man named Peter, was at a stage where he was—he had been on benefits and had been cut off. He was going to a hearing. And we drafted the psycho-social, and then attended the hearing with him.

Two days before he went to the hearing, he had [435] started at the Lehigh School for Drafting, which was his first attempt at training in several years.

The day that we prepared the psycho-social, he was very upset. The day after the hearing he quit the school program altogether, and felt that he couldn't concentrate there; that he was anxious; that he was overwhelmed by the work and that he was so sick that he would never work.

Subsequently to that—that was last spring—in June—or May I think of this year—he received a notice that he was considered in remission and no longer handicapped

because he was no longer experienced hallucinations and delusions. And at that point he no longer had medication because he was cut off from Social Security. He was very upset.

Two weeks later he became paranoid and felt that the staff in phase 3 had plotted against him to get him cut off from Social Security, and to stop his medication so that he could no longer receive medication, and no longer had Medicaid for therapy; and wanted to quit Transitional altogether because his alternative was to apply and receive welfare, which he really felt was demeaning and very humiliating to him.

He then functioned for a couple of months in our own in-house program, which is three hours a day, which is for people really not ready for programs at all. And recently [436] he became suicidal and paranoid, and is in the hospital.

Another man who went through this whole procedure was on SSI funds; was turned down; appealed; received them; or was told that he was eligible to receive them, rather.

And the problem was that the payee was designated as Transitional Services, which is not our policy and not what the young man wanted.

In appealing who the payee should be—the whole case was appealed, and he was then cut off from benefits altogether.

[437] A. On the day that he received the notice that he was cut off from SSI benefits, he had been—he became very upset, and prior to that he was functioning in a somewhat minimal level, but still nevertheless functioning in a volunteer job.

That day he became more and more depressed, mute, unresponsive, crying. And finally, several hours later he was found in his apartment by his roommates in a mute and unresponsive position; curled up on the couch, not responding to people trying to arouse him or call his name; and was taken by police to the hospital.

And the outcome of that was a long hospitalization on an in-patient basis; and he's still in a day hospital now.

Q. Do you know the individual designated as Jane Doe 1 for the purpose of this action?

THE COURT: I didn't get the name.

MS. ZAGER: The person designated as Jane Doe 1 for the purpose of this action.

A. Yes.

Q. That is the person that was described and examined by Dr. Meyerson?

A. Right. She is a client of phase 3.

Q. How long have you known her?

A. Since February of 1982, when she entered phase 3. She had come into Transitional in August of 1980. And then [438] I met her when she became part of phase 3.

Q. What is her diagnosis?

A. Manic depressive illness, circular type.

Q. Approximately how many hours a week does Jane Doe 1 spend in counseling, therapy or other activities with trained mental health counselors?

A. I would imagine about 45 or 50. She is in a program from—a pre-vocational program from 9 to 4:30 every day; and sees the counselor several times a week, and has therapy every week.

Q. She sees the counselor three visits a week?

A. Right. They visit her at the apartment three evenings a week. And she sees them additionally on an individual basis, or talks to them on the phone when she needs to, and then goes to therapy twice a week.

Q. And had she entered phase 3 when she was receiving Social Security benefits?

A. I believe she was.

Q. Does she receive benefits now?

A. No.

Q. Do you why?

A. I saw the decision when Muriel received it, as to why she was not considered eligible for benefits, and—

Q. So you know that she was terminated after a continuing disability investigation?

[439] A. Right.

MS. ZAGER: I call the Court's attention to Plaintiff's Exhibit 43, which is the Government's initial rationale for the termination of Jane Doe 1's benefits.

It says at the very bottom of the page, "The claimant's impairment no longer meets or equals the level of severity described in the listing of impairments. Therefore, the claimant's benefits for Social Security disability are ceased as of 5/82 and terminated as of 7/82."

Q. At the time of this notice that her benefits would be terminated, did you have an opportunity to speak with and observe Jane Doe 1?

A. Yes. I have had many opportunities since then.

She was terminated in the spring, and at that point was having a difficult time. She was trying to work in volunteer work briefly at that point; and then became more preoccupied with physical symptoms of weakness and fainting and dizziness.

Q. Was this after she received that rejection?

A. Yes. I believe she received the rejection—this was in 1982, that she was rejected.

Afterwards—let my clarify the time frame, which I'm having a little trouble with.

By rejected you mean prior to the appeal and to the [440] hearing.

Q. yes.

A. I knew her during that whole period. I became—I worked with her during the period where she was going to the hearing and preparing for that.

She had been having a great deal of trouble functioning as long as she had been in the phase. She had trouble getting out of the house. She was depressed. She wasn't functioning on a continuing basis. She couldn't follow a schedule. She was having trouble budgeting; and really

suffering from frequent and serious episodes of depression.

At the period when she went back for the hearing, she suddenly became much worse.

Q. Are you now up to the hearing? I'm afraid I don't understand.

A. Yes. Is that not the time frame you're referring to?

Q. Before we get to the hearing, I'd like to ask you—I'm referring to page 212 of Plaintiff's Exhibit 43.

Do you recognize this letter?

A. Yes.

Q. What is it?

A. This is a letter that Dr. Paley, Muriel's psychiatrist mailed to me.

Q. Would you read it, please?

[441] A. On July 23, 1982. "Dear Peggy, Miss Lopez was in to see me tonight, and I feel she had deteriorated since her last visit with me. Although not actively suicidal or grossly psychotic, there is much more evidence of a thought disorder. Her effect quite flat, and she seemed unconnected.

"I understand Muriel is under a lot of stress right now, including the therapy innovations and her upcoming Social Security hearing. However, I would appreciate your calling me next Tuesday, sometime after 10 A.M., and letting me know how she's doing there.

"Sincerely, Ann Paley."

Q. Did you indeed call Dr. Paley?

A. Yes. I saw Muriel on July 26th, and then spoke to Dr. Paley.

Q. What actions did you take?

A. I brought Muriel in for an interview and met with her extensively. And at that point, she was much worse than she had been. Her thinking was disorganized and she was having trouble completing her thoughts.

She was having much more trouble getting out of the house, and much more fearful and frightened. And she

talked about becoming—having suicidal ideas that had become much worse when she had been preparing the psycho-social with her counselor.

She said the suicidal ideas had been there for the [442] last month, but she hadn't brought them to anybody's attention. But at that point she was no longer sure if she could control her impuse to hurt herself, and was thinking about jumping out of a 17 story apartment building in which her sister lived.

So I brought her into Arista for an emergency evaluation. And in the next period of a couple of weeks she continued to receive almost daily evaluations at Arista; to meet with me frequently and her own counselor; and resided in phase one. And after several weeks was able to go back to the apartment.

Q. So at the time of her hearing for the administrative law judge, she was back in phase 1?

A. Right. She had come back to phase 1 a couple of days prior to the hearing. And that was when she was so suicidal, and so frightened and so acutely distressed and depressed.

MS. ZAGER: I have no further questions.

CROSS EXAMINATION

BY MR. KOOLYK:

Q. Miss Lyons, when one of your clients gets a notice that Social Security is considering reviewing the case and may terminate benefits; does such notice come by your desk? Do you see the initial notice that notifies the client that their case is under review?

A. All of the initial communications with SSI goes to [443] Marguerite Murphy, who is the Human Resources coordinator; so she receives all communications back and forth.

Wherever there is an action needed by the client, the counselor and the client is informed of that action that is needed.

Q. Did you ever discuss with her the idea of preparing the psycho-social survey at the time of the initial claim or the initial reconsideration of the claim, rather than waiting until you get to the administrative law judge hearing?

A. No. And I have to really refer you to Marguerite Murphy, because I'm not as well versed in the whole process as she is, and that is not my area of expertise.

So I would become involved really in response to Marguerite indicating that there is something that needs to be done.

MR. KOOLYK: No further questions.

* * * * *

[476] JOSEPH BIRKMAN, called as a witness, having been first duly sworn by the Court, takes the witness stand and testifies further as follows:

DIRECT EXAMINATION

BY MS. ZAGER:

Q. Mr. Birkman, where are you employed?

A. I am employed at Transitional Services for New York, Inc.

Q. Will you describe briefly your educational and work background?

A. I have a bachelors degree in psychology and a masters degree in social work.

I got my masters degree in 1979, and since that time I have been employed at Transitional Services; first as a program coordinator, and secondly for the last two years as the clinical director of our phase 2 supervisory department program.

Q. Phase 2 is the second phase of the residential program described by Miss Lyons: is that correct?

A. Right.

Q. What skills must someone have to function in phase 2?

A. Basically, as Miss Lyons had mentioned earlier, the skills that are basic to being in phase 2 are being developed.

[477] For most of the people who do enter our program, they have not lived on their own prior to their hospitalizations and prior to their entry into the program.

So we're dealing with them around basic issues of organizing, in terms of time and space; in terms of beginning to develop basic cooking skills; basic interactional skills; basic travel skills, as well as apartment management skills.

Q. As part of your responsibilities as phase 2 director, have you been involved in your individual clients' claims for Social Security benefits?

A. Yes, I have.

Q. What do you do?

A. By and large, my responsibilities are to become involved, and it's normally at the ALJ level.

Where there is a hearing, I work with counselors around preparing psycho-social drafts. I work with the client around preparing them for the hearing.

On some occasions I have attended hearings with clients. And then I pick up the pieces after the hearings.

Q. What do you mean by that?

A. Well, for most of us who deal with stress, regardless of its cause, we respond with various coping mechanisms. Our clients' responses to stress are normally somewhat more exaggerated than ours would be.

I would be working with people around depression, [478] anxiety. We often find during the hearing process that clients begin to have difficulties around program attendance; difficulties around their general functioning. They're much more hyperactive.

I have had cases where my clients have in fact become very hysterical and histrionic in hearings.

I have had people who have, prior to the hearing, overdosed on medication. I have had people who in fact became quite agitated, guarded and paranoid.

Q. Do you know the person designated as Richard Row 5 in this action?

A. Yes, I do.

Q. Did you work with him at the time of his Administrative Law Judge hearing?

A. Okay. What I know of Richard Row 5, at that point in time he was not in my phase. He was in phase 1.

I was aware of him, and I had in fact conferred with the phase 1 director because he was soon to enter phase 2.

At that point in time he became quite angry, quite paranoid. He was very upset about the fact that, when going over some of the early history, psycho-social history, he was very much frightened by the fact that some of the information there, particularly in terms of bad experiences he had had at his work situation, would be brought out.

[479] He was, at that point in time—again, became very agitated, unable to maintain his daily functioning; his move to phase 2 was put off.

He overdosed on some medication. And really, his basic functioning became impaired for a six-week period.

Q. Do you know the person designated as Jane Doe 3 in this action?

A. Yes, I do.

Q. For how long have you known her?

A. I have known her since she entered the program, in 1981. She's been in phase 2, I believe, for approximately two and a half years.

Q. And have you been involved in any way in her Social Security application process?

A. I was involved with her ALJ hearing. At that point in time I became quite depressed.

She is quite obese—apart from her psychiatric diagnosis—she is also quite obese and has numerous health problems or medical problems.

At that point in time, again, she became quite depressed; program attendance lagged. She was unable to follow through on her daily responsibilities. She entered upon numerous eating binges around that time. And

again, she found it very difficult to function. She was quite hysterical at times; went into crying jags.

[480] I believe at the hearing she also became quite hysterical, as did Jane Doe 1. It was a very difficult situation for her.

Q. Had she been improving prior to the need to go to an ALJ hearing?

A. Yes. Apart from her chronic depression, she had been functioning on a much higher level.

Q. So there was a connection between the Social Security process and these crying jags, etcetera?

A. In my opinion, yes.

MS. ZAGER: Thank you.

CROSS-EXAMINATION

BY MR. KOOLYK:

Q. Could you give us an estimate of what percentage of the clients at Transitional Services would be considered non-psychotic?

A. I don't know what you mean by non-psychotic. If you want to know how many people are classified as having a mental disorder, I would say 100%.

Q. No. What I mean is, on their primary diagnosis, if you—

A. 99% are diagnosed as having a major functional psychotic illness.

[481] Q. 99 percent are functional psychotic?

A. Yes.

MR. BERGDALL: Your Honor, if the reporter is agreeable to stay, we would like to put on Dr. Francine Cournos.

FRANCINE COURNOS, having been duly sworn by the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ZWICKEL:

Q. Dr. Cournos, what is your specialty?

A. I am a psychiatrist.

Q. When did you get your medical degree?

A. In 1971.

Q. From what institution was that?

A. New York University.

Q. What is your medical training?

A. I then did two years of internal medicine and three years of psychiatry residency.

Q. At what hospital?

A. New York State Psychiatric Institute.

Q. Are you Board Certified?

A. Yes, I am.

Q. And are you state licensed?

A. Yes, I am.

[482] Q. Have you also taught psychiatry?

A. Yes, I have.

Q. Where did you teach psychiatry?

A. I'm an assistant clinical professor in the Department of Psychiatry, Columbia University.

Q. Do you currently teach psychiatry?

A. Yes, I do.

Q. For how long have you been teaching psychiatry?

A. Since '76.

Q. Have you also been employed as a psychiatrist?

A. Yes, I have.

Q. Would you tell us what positions you have been employed in and where?

A. I work for the New York State Office of Mental Health. I've run an inpatient unit at Psychiatric Institute.

I currently run the commodity service, which consists of an inpatient unit and two outpatient clinics.

At Psychiatric Institute we serve the Northern Manhatten and Cachman area, and I also work as a medical officer at the New York City Regional Office, for this State Office of Mental Health.

Q. What is the Psychiatric Institute?

A. It is a component of the Columbia University Department of Psychiatry, and it is a State-funded

research institute within the State Office of Mental Health.

[483] Q. And you are the director of—

A. The Washington Heights Community Service, it's called.

In other words, I'm director of the clinical component of the New York State Psychiatric Institute.

Q. Are there both inpatients and outpatients as part of your clinic?

A. Yes.

Q. Who are the inpatients?

A. The inpatients are in Psychiatric Institute itself.

Q. And where are the outpatients treated?

A. We have two outpatient clinics, one located in Washington Heights and one in the Inwood-Cachman area.

Q. Could you tell us about how many patients are treated in the inpatient unit first, and then at the outpatient unit?

A. We have 18 beds, and we have 700 outpatients. 18 inpatient beds and 700 outpatients.

Q. So how many persons would you say are treated yearly on an outpatient basis?

A. Well, we—we have a lot of patients who stay in treatment indefinitely, but including turnover, which is usually based on people moving into the area and other people moving out, we probably see a thousand individuals.

Q. And are these people persons who come from the [484] Northern Manhattan area?

A. Yes, they are.

Q. What percentage of the people that you see have a prior history of State psychiatric hospitalization?

A. Approximately 90 percent.

Q. How many of these people stay with your program for a relatively long period of time?

A. I would say the majority, about three quarters.

Q. What would you say is a long period of time?

A. I would say a long period of time is forever, for a lot of the clients that we see. Many years.

Q. These are people who are regularly seen on either an outpatient or inpatient basis?

A. Right.

Q. Is it true that some of your outpatients in fact become inpatients?

A. Yes. Periodically most of our outpatients—well, many of our outpatients do become inpatients.

Q. What type of individuals are provided in both the inpatient and outpatient facilities?

A. Both the acute and what we call subacute psychiatric hospitalization. Patients who need to stay in the hospital indefinitely are transferred to Manhattan Psychiatric Center.

In our outpatient programs we provide a whole array [485] of outpatient services—individual therapy, family therapy, group therapy and day therapy.

We also do vocational assessments.

Q. Before I ask you about vocational assessment, what are the diagnoses, the range of diagnoses of the people who are treated at your facility?

A. Approximately 65 percent of our patients are schizophrenic, 25 percent are manic depressive and the remaining ten percent have a mixture of other illnesses.

Q. How would you categorize these people in terms of the mentally ill population?

A. They are at the most seriously ill levels.

Q. Are people who have been state hospitalized generally people who have had a serious mental impairment?

A. Yes, they are.

Q. What do you do in terms of a vocational assessment at your facilities?

A. Well, when a patient comes in, either in our outpatient unit or outpatient clinic—actually, I should say when

a person comes in our inpatient unit we have an occupational therapist who works on that unit. And usually the client at that time is quite psychotic. So that most of what we do is the assessment of the activities of daily living—rooming, ability to feed oneself.

When the patient gets transferred to the outpatient [486] clinic we do a more elaborate vocational assessment, including the ability of the client to complete simple tasks, how many steps in a task they are able to complete, what kind of concentration span they have and how they relate to other people in a group setting.

Q. And is one of the purposes of the vocational assessment to see whether or not these people can in fact work?

A. Yes, it is.

Q. How many of the people that are seen by your clinics are assessed as able to work?

A. Well, that's a hard question to answer, actually.

I would say that very few of our clients are considered actually able to work.

But a certain percent of the clients who aren't able to work are considered to have enough potential to put through a training program of some sort. I can't though, tell you what percent.

I would say it's a minority of our patients who are even at that level.

Q. Are many of the patients working at that level of treatment?

A. Extremely few in our service. I would say probably ten percent of our patients have some type of employment. Most of those patients work part time.

[487] Q. But there are certain patients that you identify as having the possibility of working and you take certain steps?

A. Yes, we do.

Q. What sort of steps do you take to—

A. We have a transitional work program within the clinic, and if the patient does well in the transitional work

program in either clinic, when we refer them to an outside agency, such as the Office of Vocational Rehabilitation Fountain House, for a more structured program.

Q. Thank you.

Is this your curriculum vitae?

A. Yes, it is.

Q. I would like to introduce this as Plaintiff's next exhibit, I think it is 59.

Dr. Cournos, do any of your patients receive governmental assistance?

A. Approximately 90 percent of our patients are in some sort of entitlement.

Q. What sorts of assistance do they receive?

A. That's changed slightly.

In 1981, of our 700 patients at that time—well, let me just say this. We do a study once a year called the patient characteristics study.

At that time we collect systematic information [488] on every patient we have seen that week.

So the number I am going to give you are based on that study.

Q. And who would—

A. State administers this study at all state facilities.

Q. Who prepared what you are reading from now?

A. My administrator prepared from those forms the data I am about to present.

[489] Q. Is this someone you regularly work with and deal with and rely on?

A. Yes.

Q. Did you go over the figures with him?

A. Yes, I did.

In 1981 we recorded 705 patients in the week that we did the visit. 15 percent of those patients were on social security disability. 44 percent were on SSI. And 33 percent were on welfare.

In 1982 we had slightly different statistics. We had 646 patients the week of the survey. Ten point five percent were on social security disability. 35 percent were on SSI. And 44 percent were on welfare. So we had had an increase of 11 percent welfare, a decrease of 9 percent with SSI, and a decrease of about 4 percent with social security disability.

Q. So there was a trend, a decreasing trend, with respect to the federal program, and an increasing trend with respect to state local welfare program; is that correct?

A. That's correct.

Q. Is it likely that the type of patients that would be seen by your facility would show signs of medical improvement?

A. No. Our patient population didn't change. The type of patients we see did not see in that period of time.

[490] Q. Is it likely that the increase in welfare was attributed to either more denials for social security terminations?

A. Yes. As far as we could tell. Either new patients applying were being turned down or patients that had previously been receiving benefits were discontinued.

Q. And this was a trend that you experienced about when?

A. Starting in 1981, I would say.

Q. Had this trend been experienced before that time?

A. No, it had not.

Q. You are familiar with patients in your program?

A. Yes, I am.

Q. Based on your understanding of their diagnoses, is there a significant difference between the characteristics of the patients who are receiving welfare, public assistance, on the state local roles, and the characteristics of the patients who are receiving, say, SSI benefits on the federal roles?

A. No. Diagnostically the patients are approximately the same.

In 1981, in each category, disability, SSI and welfare, approximately 60 to 65 percent of those patients were schizophrenics.

Q. Who were on the state–

[491] A. Who were in any category of entitlement.

There was a slight change in that in 1982, altough I don't think the numbers are enough to be considered statistically significant, but we had a drop in the number of patients receiving social security disability who were schizophrenic. That diagnosis went down.

Q. What do you attribute to the fact that the persons with the same general type of diagnosis would be receiving state welfare instead of SSI?

A. In our experience, the degree of pathology the patient has doesn't determine which type of benefit they are receiving. It's just luck of the draw, as far as we can tell.

Q. Is that it?

Do you think that certain people are lucky or certain people are more able to deal with the social security system?

A. It's hard to say. They don't differ that much, psychiatrically speaking, the classic signs and symptoms that psychiatrists are interested in.

My guess is that they probably do differ in their abilities to negotiate the staff or to involve the staff at the clinic in helping them with the process. Because unlike the people who just testified, we don't routinely check the letters that patients get. They have to [492] bring them to our attention for us to help them.

Q. Is it also your sense that most or many of the people on welfare have in fact been people who were either denied or terminated from SSI benefits?

A. Some are. I don't know what percent of patients on welfare have acutally applied.

Q. Do your patients ever appeal their social security SSI denials?

A. Yes, they do.

Q. Does your program ever assist them?

A. Yes. If the client has brought the problem to our attention we are very active in assiting him.

Q. You told me before you had an estimate of how much staff time it costs in terms of pursuing a certain type of appeal.

Could you tell me what that estimate is.

A. We estimate it costs us approximately one thousand dollars in staff time to take care of a routine appeal. That includes all the steps before it as well.

Q. And what does a routine appeal mean?

A. By routine appeal, a person who has had a reconsideration at the local level, and then has a hearing with an ALJ.

Q. Are there people in your program who have suffered as a result of receiving either denial or termination notices [493] from social security?

A. Yes, there are.

Q. Could you explain in what way they are in fact adversely affected in treatment?

A. Many patients are psychiatrically quite unstable at the time that they are either turned down or their benefits are discontinued, and this results in a general worsening of symptoms. It varies with the patient's symptoms.

Q. Have there been patients who have been hospitalized?

A. Yes, there have.

Q. What other sorts of decompensation takes place?

A. Well, in general, patients begin to worry about how they are going to survive, how they are going to pay their rent, feed themselves.

Even when they are able to apply for welfare, there is often a period in which they have no income whatsoever, while they are trying to negotiate the welfare system. Frequently they become much more anxious. Sometimes they become more psychotic.

Q. Is it your sense that these symptoms are alleviated by taking the appeal to the social security system?

A. The symptoms are not. The patient is just as anxious about the appeal as they are about the initial process by which they have been turned down.

[494] Q. The people who have been turned down by social security, is the finding in these cases that people can in fact do some sort of work?

A. It's not the view of the clinical staff in almost all instances that they can in fact work.

Q. Is that the view of social security?

A. Yes. Usually the client gets a very routine statement, sort of a form letter, that basically says that although we know you cannot do your usual work, we think you can do a job involving simple tasks.

Many of our clients have no usual work so it really doesn't refer to a specific job that person was in fact doing.

Q. Is social security's finding consistent with your clinical diagnosis that in fact these people can do simple tasks and therefore can work?

A. Some of our patients certainly can do simple tasks, but to extrapolate from that to the ability to work is a jump that most of our clinicians find they themselves cannot agree with.

Q. Do your patients often or sometimes function in a household way, do they do household chores?

A. It varies quite a bit. Some of them can do almost nothing and some of them can do household chores.

Q. And does the fact that some of them who can do [495] household chores—can they in fact work?

A. Many of them cannot.

Q. I asked you to bring with you a couple of examples. If you could briefly go through these. A few people who in fact received notices from social security and what happened to them. I don't think this will take much time.

THE COURT: Yes, it will. I don't see any point in it.

MR. ZWICKEL: They would be specific examples of what she has testified to.

I have no further questions.

[496] CROSS EXAMINATION

BY MR. KOOLYK:

Q. Dr. Cournos, did you do the studies for 1983?

A. No. we do it this month.

Q. And you don't have your figures for years before 1981?

A. No. The study wasn't done for out-patients until 1981. It used to be exclusive an in-patient study.

Q. The figures you reported showing a decrease from 1981 to 1982, is that difference statistically significant?

A. I didn't really subject it to statistical significance.

Q. You don't know whether it is statistically significant?

A. No, I don't.

THE COURT: I would think it would clearly be. You can analyze it, if you want to. I'm going to assume it is significant.

Q. With respect to let's say 1981, you showed 33 percent on Welfare?

A. Right.

Q. And you don't know for sure how many of those didn't apply – isn't it the case that to get Welfare you have to, one, apply for Social Security, for SSI?

A. Actually, I really don't know the answer to that, [496A] because this isn't the area I tend to concentrate on myself as a psychiatrist. Mostly this is done by Social Workers. I don't know this.

[497] Q. One of the witnesses right before said something about the state being ferocious now in making sure that you have an SSI application in?

A. Right. But I think it might be different for people living in a transitional living program than it is for someone just living on their own. I could be wrong about that, I'm not the right person to address that question to.

Q. Do you know whether the people who did apply actually went down to an interview if they were called or followed up?

A. Yes. Some do and some don't. Whenever we're aware a patient has an interview if we think they can't get there themselves, we'll escort them. But some patients are called to interviews that haven't mentioned it to any staff person and they don't get there.

Q. You're dealing with severely mentally ill people who are getting this mail to their own names and you're relying basically on them to come forward?

A. That's right.

Q. It is surprising to you that a large percentage of them would just not follow through?

A. No, it's not surprising to us. I guess the only surprise is that the numbers have shifted for us because [498] we don't view our patients as having changed as having gotten better or worse between '81 and '82, so whatever the process –

Q. Are you aware that the continuing disability investigation process has gotten underway around that time?

A. Right. But a lot of the SSI numbers include people applying for the first time. And you know, people just having more difficulty getting an initial ruling in their favor.

[499] Q. If you add in the '82 figures, if you assume that in 1982 people were being ceased, when in 1981 very few were, then that might indicate that as far as original applications, they were being accepted or denied at the same rate?

A. No I think it's different because almost all of the patients that we have were recertified and lost their benefits were in the Social Security disability category, SSA or SSD. I don't know which initial people then to use. But in the SSI category these were primarily people applying for the first time.

Those people, at least in our section weren't being recertified, very frequently, if at all.

Q. Recertified being reinvestigated?

A. Right. It was almost exclusively, for us anyway, the clients who got asked to go to—got a letter saying in the social security disability category, not in the SSI category.

Q. So your perception is that this process of ceasing applies only to that very small percent or ten percent of your patient level which is on SSD as opposed to SSI.

A. That is our impression. That the discontinuation of benefits is in the SSD category.

[500] Q. With respect to vocational assessment that you make, could you repeat again the factors that you assessed?

A. Again, I'm not the best person to testify about exactly what's done clinically because the occupational therapists who work for me do this, but they have a system worked out whereby they assess people's ability to carry out activities of daily living and to complete tasks that they consider vocationally relevant.

Q. Maybe you don't have input here. If not, tell me.

But do you believe that the ability to do daily tasks predict vocational outcome to some extent?

A. I think the ability to not do them tends to predict an inability to work successfully. I don't know to what extent the ability to do the kind of tasks we are asking the patients to do, which tend to be simple, would then translate into the ability to work.

Q. How did you arrive at the $1,000 figure for staff time on appeal?

A. I spoke to staff at the clinics and asked them to estimate how many hours they spent preparing all of the forms and appearing at a hearing. And I came up with 20 hours of social work time, five hours of psychiatrist's time and about an hour of a secretary's time.

Included in that, by the way, though, was the assumption that there was some slightly increased clinical [501]

contact with the patient, because, in general, most patients, while they are going through this process have a worsening of their symptoms, and need several extra contacts.

That was a conservative estimate, because we've had patients who become so ill that the amount of time they have required is astronomically greater than the amount that I am giving you here.

THE COURT: I take it this would all be avoided if they were granted in the first instance benefits?

THE WITNESS: Well, I think in the cases where the client had clearly fallen apart in the process of being told their benefits were going to be discontinued, I think in those cases it would be avoided. If in fact they had been granted the benefits or they were allowed to continue on the benefits.

In all of our patients' lives there are a lot of other factors that influence how well they are.

Q. But this thousand dollar figure relates to how much extra it is going to cost you if the person loses on reconsideration and has to go through the ALJ level?

A. It includes the whole process of let's say the client being sent a letter in which they are told they have to be recertified, the reaction of the client to that, reconsideration at the local level, and the appeal process.

It included the most conservative estimate of [502] what amount of time it would take the staff at the clinic working with the client, including a few extra sessions to calm the person down.

THE COURT: That would be about a thousand dollars for you and it would be all of the extra time and effort of the bureaucracy, which would be very considerable. In addition, the wear and tear on the client.

THE WITNESS: Yes. I mean we've had clients who've had to be seen daily. We've had one person who was convinced she was going to starve to death if her benefits were discontinued, which they were temporarily, and she had to be seen every day.

THE COURT: Has there been any estimates of what it costs the bureaucracy, if I may refer to it as that, to handle one of these cases on reconsideration, and then all the way up?

MR. ZWICKEL: The social security appeals process.

MR. KOOLYK: At the ALJ level?

THE COURT: That and before.

MR. KOOLYK: I suppose there is a budget for the ALJ that could be divided by the amount of cases.

THE COURT: And the appeals counsel, and then of course you have the first reconsideration, don't you? That's before it goes to the ALJ.

I would be very interested in finding out what the [503] cost of termination has been over the last few years for these tens and tens of thousands of cases.

Q. What percentage of the thousand dollars is money spent to—after the letter comes in saying that the person is going to be subject to a reconsideration, until there is a decision at that level? The initial—

A. Say that one more time.

Q. How much of the thousand dollars is spent from the time the continuing review process begins until the time you get your first decision?

A. How much until the reconsideration at the local level?

Q. No, no, until the first—

As I understand it, social security—social security continuing disability review occurs as follows:

A letter comes to the claimant saying that we are going to review your case, and if you have additional information send it in.

A. Right.

Q. At some point down the line they will get a letter saying that you are no longer entitled to benefits starting from May of 1983; correct?

A. Right.

Q. How much of the thousand dollars is spent on activity conducted until that letter comes as of May '83?

[504] A. Maybe approximately half. And the other half afterwards. It's hard for me to really break it down that way because it really depends on, you know, on the individual situation.

[505] Q. Well, the five hours psychiatrist's time, does that include time that—for the psychiatrist to appear at a hearing?

A. No, actually, the psychiatrists probably wouldn't appear at the hearing; the social worker would.

That five hours was needed both to fill out the forms, and I think a lot of thought has to go into it on the part of the psychiatrist, to write a convincing four-page form, and also the amount of additional time a psychiatrist is required to spend with a client as the symptoms worsen.

Q. And you believe that actually the average amount of time the psychiatrist in your program used to complete one of those forms is five hours?

A. No, the five hours wasn't totally that.

I would say maybe an hour and a half might go into the amount of time they spend reviewing the chart and writing the form out, and then somebody types it. And that the other three and a half hours is a very conservative estimate of the additional time that the psychiatrist will spend with the patient, because the patient's symptoms worsen over what tends to be a process that lasts, if it goes to an A.L.J., approximately ten months.

It could be in that period of time that, you know, dozens of psychiatrists' hours have been spent [506] with a client who's fallen apart. But we took—we just assumed in that estimate that the patient only had a mild worsening of symptoms.

Q. Would you be able to deduct from that estimate the amount of money which it takes to, I take it, make sure that the process isn't psychologically harmful or to reduce the psychological harm that the patient is suffering from

the process itself, and deduct that and leave just the amount of time that the social workers and psychiatrists spend on preparing information for social security purposes, and going down with the client through a hearing, if necesary?

A. It's quite time-consuming for the social workers. I would say that a lot of the social work costs would stay in there. The psychiatrists' time would be about a third. So $500, half, approximately, if you eliminate the concept that the client requires any more services because of a worsening of clinical symptoms.

Mr. Koolyk: No further questions.

REDIRECT EXAMINATION

BY MR. ZWICKEL:

Q. The $1,000 figure, that is from your program state money?

A. Correct.

Q. And that figure would not include, for example, [507] the patient who is hospitalized, state hospitalized; that would be a separate cost?

A. That's totally separate. We did not assume that the patient would be hospitalized in the average situation.

THE COURT: Thank you very much, Doctor, I'm sorry to have kept you so long.

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[620] MR. KOOLYK: Yes. I'd like to call Dr. Maurice Osinoff.

MAURICE OSINOFF, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOOLYK:

Q. Dr. Osinoff, are you licensed to practice medicine in the State of New York?

A. Yes, I am.

Q. And do you have a specialty?

A. Psychiatry.

Q. And are you a practicing psychiatrist?

A. I'm not—I had an office practice. I'm now [621] employed by the Office of Disability Determinations, New York since 1979.

Q. And do you function within the Office of Disability Determinations as a review psychiatrist?

A. Yes, I do.

Q. And could you describe your functions as a review psychiatrist for the Office of Disability Determinations?

A. Well, from June, 1979 until the end of April, 1982, I was assigned to Operations, which is reviewing the determinations. Since the end of April, 1982 until the present time, I've been assigned to the section called Quality Assurance.

Q. And what's the function of Quality Assurance?

A. My function in Quality Assurance is to review the psychiatric determinations by the other review physicians in Operations.

Q. Is that an internal state check on how well the cases are being adjudicated?

A. That's correct.

Q. Do you handle mostly mental impairment claims?

A. Yes, I do.

Q. And do these include original claims by people seeking Title 2 or SSI Social Security benefits.

A. It includes those Titles 2, Title 16, which is SSI, and also the CDI determinations, the continuing

[622] Q. I see. And after the initial decision with respect to original Title 2, Title 16 or continuing review case, if the claimant further appeals to the State agency to reconsider it's decision, are those cases also referred to review psychiatrists?

A. They're referred to the review psychiatrists in Operations, but that doesn't necessary mean that I will see

all these cases. The number of cases I see are limited. There are those cases which are assigned to me.

Q. I see. Could you tell me approximately how many claims folders you go through in a month in your present position?

A. Well, I usually work six hours a day approximately five or six times a week. I usually review anywhere between 18 and 25 folders, in addition to being a consultant to the Quality Assurance analysts and also answering returns from DAB, from the Federal Government.

THE COURT: 18 to 25 folders a month?

THE WITNESS: No. I'm sorry. Per day, but I don't know what the figure is per month. I haven't figured that out. I'm sorry.

THE COURT: I see.

Q. Is it safe to say you've reviewed hundreds of claims this year already?

A. Oh, yes.

[623] Q. And over the past several years since you started—since you began working at the Office of Disability Determinations?

A. Yes.

Q. Now, in the period in which you were serving in the internal Quality Assurance section after you first came there, this would be the latter part of 1982?

A. April—the end of April of 1982 I was assigned to Quality Assurance.

Q. Now, let's—limiting myself now to this period between April 1982 and the end of 1982, I'd like to ask you in reviewing a claims folder to determine whether the claimant was entitled to benefits on the grounds of mental impairments, what sort of review would you perform?

A. Well, I have to review the medical evidence in the file as well as the allegations of the claimant. We're involved with symptoms and signs and laboratory evaluations and reports from a treating source, whether it's a

treating psychiatrist. If there is no treating psychiatrist, when we have the consultant evaluations with the other psychiatrists outside of our Bureau. It's called CEDM's.

Q. And is it the case that there is a sequential evaluation process that you perform with a file? Does that ring a bell with you or do you know what I'm referring to?

[624] A. No. You're speaking probably about sequential development. I involved myself with the medical evidence and this is what I review.

Q. Okay.

Once you have the medical evidence, how do you use that evidence to reach a decision?

A. Well, in reaching a decision, we have to employ the standards of the POMS, the Programs Operations Manual Section of the Federal Government, and we use these guidelines and try to correlate the mental status that we have in the file; we correlate the function, the daily functions, the activities of this individual during the day, what their capabilities might be and their relationships, and these are according to the disability manual in the POMS.

Q. Are you familiar with the Social Security listing of impairments?

A. Yes, I am.

Q. And how do you use the listing of impairments in—still referring to 1982, how did you use the listing of impairments in evaluating the claim?

A. We were able to use the listing in terms of items called 12.03 A and B for the functional psychotics, 12.04 A and B for the nonfunctional, those that are not psychotic and we're able to set off a mental status plus including the—what we call the residual functional capacity of these [625] individuals and correlate these according to the standards of the listings.

Q. Now, with respect to each claim, did you have to determine whether the claimant met or equalled the listing?

A. Yes, that was part of the determination.

Does it meet the listing of 12.03 or 12.04, or you go into the other areas of chronic brain syndrome which is 12.02 or mental retardation, which is 12,05.

Q. Basically focus on those two you just mentioned, the functional psychotic and function non-psychotic.

In determining whether a claimant, based on the medical evidence, would you consider anything beyond the findings that were observed in the latest mental status examination performed on the applicant?

A. I don't understand the question. Are you referring to the mental status evaluation and the part—which is part A as 12.03 and 12.03 B, because that is what is considered—meeting the listings, they would have to meet both 12.03 A, which is the mental status plus B which is the functional capacity.

Q. I see.

A. The functional capacity involves the—what would result—the resulting persistance of daily activities, construction, rather, in daily activities or construction of interests or inability to relate to others.

[626] Q. I'll just place a copy of the listings before you.

A. Yeah. Yeah.

Q. Now, in assessing whether based on the medical evidence a claimant met the listings, part A or part B, would you—let's say you have the claims folder which relates to a chronic mental—mentally impaired individual, an individual who's had one or two hospitalizations already, has a spotty at best work history over the last few years, shows—is not given a clean bill of health by any examining doctor that reviews his case and has been labeled schizophrenic in diagnostic material.

Now, in reviewing the claims folder with respect to that type of individual, will you consider the list reflected in the medical charts or other sources in deciding whether he meets all the listings?

A. That would be part of the consideration, the longitudinal history or past history, but also important is

the current findings, and if the current findings correlate with the past history, that individual would probably meet the listings.

Q. All right.

We're talking the current tense, but was that the case in 1982 as well?

A. Yes.

[627] Q. Now—

THE COURT: Excuse me. Could you read back the answer and the question. My secretary interrupted and I lost the trend of the question.

(Record read as requested.)

THE COURT: So you do consider the longitudinal history?

THE WITNESS: Oh, yes

Q. Will you consider in such a case evidence with respect to work attempts that the individual made either in the competitive sphere or in a workshop environment?

A. I think that would be significant.

Q. Now, I assume that category of the patient I sort of generally described is a fairly common applicant?

A. Yeah.

Q. And you've seen large numbers of such claims?

A. Yes.

Q. Did it often happen that you review a case, consider the evidence, conclude that the applicant did not meet the listings, but nevertheless believed, based on your clinical experience, that this is an individual who it's unreasonable to believe would be able to work?

A. The only way I can answer that question is the consideration which we do in our agency of medical-vocational factors. I think this is what you may be alluding to, if [628] I follow your question.

Q. Well, would you say that you assess medical-vocational factors in making the determination whether the listings are met?

A. That's part of the consideration, yes.

Q. Now, did you understand what I just said now, medical-vocational considerations?

A. Well, for example, depending on what the individual's vocation is, and I'm not a vocational expert, because we consult with the vocational experts, but depending on what type of work they were doing, we take that into consideration, depending on whether it's skilled work or unskilled work, and that has to correlate with the type of psychotic process or ongoing psychotic process; and all these factors are taken into consideration, their regular activities, their relationships, whether they would be able to manage unskilled work or skilled work. These are factors that are considered in terms of their mental stages.

Q. Well, do I understand the review process correctly that there's two people reviewing a case really, a psychiatrist and also a lay claims examiner? Is that correct?

A. Well, the lay claims examiner, known as the review analyst in Operations, prepares the case, provides—obtains [629] all the medical evidence and all the information as to vocational expertise and so on, and then this is reviewed by the review psychiatrist or review physician in Operations.

Whatever determination is made, if I am assigned this case, I will review the evidence, the medical evidence with the vocational factors and the review—and the review physician's determination and rational.

[630] Q. I understand that as a quality assurance you are sort of at a second level. At operations, is the way it works usually that—did you say vocational analyst?

A. There are vocational analysts.

Q. That's the general lay person who reviews the claim?

A. The review analyst.

Q. The review analyst.

Is it generally the case that a review analyst will look at the folder first, make the judgment, write down

something on a piece of paper and then the claim goes to the physician to see what he thinks about it?

A. Very often the review analyst preparing a record with all the medical evidence and all the necessary information on vocational factors, will often consult the review physician to help in the determination whether there is sufficient evidence, whether there is anything else that has to be obtained, because the important factor is documentation.

And the review analyst may forward what they call a DF232, which is a request for advice.

At which point the review physician will fill out the questionnaire and help in the determination.

Now, some of the determinations can be made by review analysts when they are rather simple and uncomplicated, [631] but a good number of mental impairments are not that simple.

Q. If it is not simple, then is it the case that even though it might be the review analyst who writes the form and it is only signed at the bottom by the physician that the analyst has already spoken to the physician before the writing and has put down—

A. That often happens.

Q. Now, assume that we have a record that—a record comes to you as a quality assurance person, or let's say to an operations psychiatrist. And the record has written in there that this is an individual who does not meet the listings: He has some impairment in this ability to relate to people; he has also some impairment in his ability to sustain stress. However, it is believed that he is capable of performing routine unskilled work in a low-stress setting. Therefore, the claim is denied and there is a signature line there with the physician's signature.

Now, was it the case, in New York, at the Office of Disability Determinations at the end of 1982, as far as you were aware, that the review physician actually believed that that was true, that the person, based on his own

medical judgment after reviewing the medical record, believed that the claimant would be able to perform in some such unskilled low-stress work?

MR. BERGDALL: Objection. I object to the witness [632] testifying about the belief of any other physicians other than his own.

THE COURT: Well, he's in operations. He can tell us what the practice is.

MR. BERGDALL: Your Honor, at the time he said he was in quality assurance.

THE COURT: Quality assurance in April. But previously he was in operations. Why don't you ask him foundational questions about whether he asked it and what the general practice was?

Q. As far as your own personal activity was concerned—do you remember the question—is that the way you approached it? If you signed such a form, that that would reflect your medical opinion?

A. Yes.

THE COURT: Put the question. That the claimant was capable.

Q. That the claimant was capable of performing some sort of low-stress unskilled work despite some impairment of his ability to relate to others and to maintain long-term stressful activity?

A. I would like to—you said till the end of 1982? Because some changes took place in I believe it was February of 1982. So that type of case, you know—I had been in operations when the change took place and—and [633] let me categorize very carefully, because at the end of February, 1982 the experimental program was issued on RFC, Residual Functional Capacity. And, quoting your hypothetical example, that case would not be denied.

Now, if you want to go back to 1981, that's possible, it might have been denied.

Q. Dr Osinoff, I show you a copy of Defendant's Exhibit B.

THE COURT: Excuse me. Let me see that before you look at it. I don't want you to show him this yet. I would like to understand what you are saying, Doctor.

THE WITNESS: Yes.

THE COURT: The question, as I understood it, was whether the operations—if I may call him that—psychiatrist would under the hypothetical actually have to believe that the person could work any substantial length of time in such an unskilled job.

THE WITNESS: Prior to—

THE COURT: At any time. Let's say from 1980 on.

At any period, post 1980, were there times when the psychiatrist did not believe that the person, based on that record, could hold an unskilled job in fact for any substantial length of time, where he would [634] nevertheless approve a non-disability finding?

THE WITNESS: There were some times. Not frequent.

THE COURT: Now, as of today's date or as of February 1982, is that still true?

THE WITNESS: No, that is not true.

THE COURT: All right, now you can proceed with your examination.

Q. Post February of 1982, I take it that your testimony is that as far as you yourself handling the case, it was not true that you would deny—sign a denial unless you actually believed in your medical judgment that the person was capable of some substantial work?

A. That's correct.

THE COURT: I understand you to say that all psychiatrists would take that position post February 1982, including the witness.

THE WITNESS: That's correct.

THE COURT: But in the pre-February 1982 that was not true.

THE WITNESS: That's correct.

Q. Pre-February of 1982 can you give us an idea of, if you got a hundred cases, how many times would it happen

that the form would be signed even though the physician didn't really believe that the person could have a good chance of working in a substantial gainful activity?

[635] A. I would like to qualify that. When you say belief, are you saying in this clinical judgment?

Q. Right, in his clinical judgment.

A. Because the role of the review physician, psychiatrist, is not only clinical; it also has an administrative role.

But I would say that prior to February—the end of February 1982, many cases were denied despite the fact that from a clinical point of view we might have felt that they should not have been denied, because we were—had to go by the POMS, the Program Operations Manual Section, and the listings.

Q. You say many cases.

Could you give any sort of rough estimate as to—if you got a hundred claims to do over the course of a few days, how many times would it happen?

A. I couldn't estimate that. I could only state that it was rare before the end of 1982 to have allowances for these cases.

They became more—there were more cases that were allowed after February 1982 based on the experimental forms that were put out for RFC, Residual Functional Capacity.

Q. Pre-February 1982, with respect to those claims that would have been denied even though in the clinical judgement of the evaluators, the medical evaluators, the [636] person could not work, would you say that those claims fell almost exclusively into the functional psychotic type of claim, as opposed to within the functional claims? Would you say that they fell pretty much exclusively among the functional psychotic or did they also include the functional non-psychotic?

A. I wouldn't know the proportion, but its not exclusively the psychotics.

Q. Are you aware of any change in the way that physician evaluators within the Office of Disability Determinations review a mental impairment claim since February of this year, February of '83?

A. Yes, I am aware of some changes.

Q. Could you explain the change?

A. The changes—I should correct myself. The changes—more changes took place, I believe, it was back in October of 1982. And when you were referring to February 1983, this was based on a new form that was issued by the Federal Government called SSA4734. There's some other lettering next to it.

Q. Is that Plaintiff's Exhibit 4?

A. Yes, that's correct. Residual Functional Capacity Assessment form, called the SSA4734.

Q. Could you tell me approximately when that began to be used by the physicians within the Office of Disability Determinations?

[637] A. I'm not sure of the exact date, but I believe it was approximately October of 1982.

And when you refer to February 1983, we were still using this form. And that did not change a lot of determinations.

Q. Looking at the part of that form which refers to specifically the mental area—it is Page 3?

A. Yeah, Page 3, Page 3.

THE COURT: Excuse me just a minute while I get the Plaintiff's Exhibit.

Q. Doctor, could you read the sub-items 3?

THE COURT: Page what is this?

MR. KOOLYK: Page 3.

A. "Understand, remember and carry out simple one or two-step job instructions."

That's under 2A3.

Q. Right. It that category is marked by the review physician as limited, is that some indication of whether the claim will be allowed or denied?

THE COURT: Excuse me. I want you to be specific about the time. You are talking about post October '82, post February '83 or now?

Q. Between February of '83 and now, will an indication of limited under that item correspond in generally every case to an allowance?

[638] A. Yes, it would.

Q. And will the same be true for an indication of limited to item four on that form?

A. That also would indicate an allowance.

Q. And would :he same be true with respect to item 6 on that form?

A. That would also be an allowance. Either one or all of 3, 4 or 6 would be considered an allowance.

Q. Now, was that the case also between October 1982, when the first form came into use, and February of 1983?

A. Yes.

Mr. Koolyk: Thank you.

[639] Q. Doctor, as I understand it, there are basically three periods of time during which you have been with the Office of Disability Determinations, during which three pretty separate standards with regard to residual functional capacity have been used.

A. I don't think I could qualify it as three separate standards, but there was more classification of the standards in terms of RFC, residual functional capacity.

Q. Well, calling it clarification, let's say that the time periods are from 1979, when you were in operations, until you left operations, in April 1982; is that correct?

A. Right.

Q. And then there was a shift; is that correct?

A. That's correct.

Q. And that shift stayed in place until you are saying until about October of 1982, when a new Federal form was allowed?

A. That's correct.

Q. Is it fair to say that throughout this period of time, the beginning of 1982, there have been more medical vocational allowances than there used to be?

A. It's certainly very fair to say that.

Q. Actually, quite a bit more vocational allowances than there used to be.

A. Quite more.

[640] Q. You were more comfortable with that as a psychiatrist then you were with the old system, were you not?

A. No question about that.

Q. Prior to April of 1982 it was your understanding was it not, that any younger mentally ill person who did not meet or equal the listings of impairments would be a denial; isn't that correct?

A. I don't recall ever seeing an allowance on a younger person who did meet the listings prior to February—the end of February, 1982.

THE COURT: I'm not sure the reporter got that.

Q. As I understand it, prior to October, 1982, you never remembered seeing a younger person who was allowed a disability if he did not meet the listings.

THE COURT: Not October, prior to the end of February, 1982.

MR. BERGDALL: February.

THE WITNESS: I think I made that statement.

Q. And prior to February of 1982, if there was any assessment of residual functional capacity at all, it was given rather short shrift, was it not?

A. Well, we spoke about it—I would like to answer that by restating we spoke about meeting or equalling the listings.

This exhibit that was presented to me—it was [641] important—in order to meet the listings it had to meet items 12A and B, 12.03 A and B.

And the strict reading of this standard, which I would like to read from this exhibit, is that one or more of the following clinical signs—and they give different signs of the mental status evaluation. I won't go into all of them.

But with B—and B is very significant, and this is what made it difficult for my allowances. And that is resulting—in other words, this mental status is resulting in a persistence of marked restriction of daily activities and constriction of interests and seriously impaired ability to relate to other people.

Now, it was difficult to find cases that met all these qualifications prior to the end of February, 1982 in the younger age group, is your question.

Q. In the period prior to February, 1982 it is not fair to say that you never considered the residual functional capacity of the worker—or, excuse me, of the applicant—as it was set forth in Section 404.1545C of the regulations—are you familiar with that regulation?

A. Not particularly the number, but if you tell me what the regulation is—I'm not familiar with the number.

Q. One moment. I will show it to you.

THE COURT: What number are you looking for now?

[642] Q. I would call your attention to Social Security regulations, Section 404.1545C, which on the pamphlet you are looking on, your Honor, I believe is Page 8.

THE COURT: That's the pro bono pamphlet of this book.

Q. You've had time to review that section, Doctor?

A. Yes.

Q. And that accurately sets forth the requirements—excuse me—the factors that you have to assess for residual functional capacity in that case?

A. That's correct.

Q. Now, prior to February, 1982 isn't it the case that those factors were essentially ignored in your analysis, or given short shrift?

A. They weren't very carefully considered, and this is why, I believe, why the experimental form spec 973 came into use at the end of February, 1982 within our State Agency. And this qualified—what is quoted here—in 404.1545C.

THE COURT: What is it that qualified it?

THE WITNESS: This is what was stated in the spec 973, the experimental form that was utilized by us.

THE COURT: Where is that?

MR. BERGDALL: Your Honor, I don't believe it's in evidence. I am not certain that I have it in the [643] courtroom.

THE COURT: Where is Spec 973?

MR. KOOLYK: I lost my copy.

THE COURT: Is it marked in evidence?

MR. BERGDALL: No, your Honor, it is not.

THE COURT: Well, let's get it. It is an important thing for the witness. Where is Spec 973, wherever that is?

THE WITNESS: I may have a copy, if I may step down.

MR. BERGDALL: Yes, please, by all means.

THE COURT: You want to mark this as a Plaintiff's document or a defendant's document?

MR. BERGDALL: Your Honor, we can mark it as a plaintiff's document. I believe it will be Exhibit 64.

MR. RUBINSTEIN: 64.

THE COURT: What you will do is give Xerox copies of this to the Court and everybody else and make sure the doctor gets his copy back.

THE WITNESS: I have it.

THE COURT: He doesn't need it. Okay. Xerox it for me, please. Here, you can use it and examine him.

Q. Doctor, this form, which is marked as Exhibit 64, was issued by the New York State Office of Disability Determinations; is that correct?

[644] A. That an inhouse New York State Issuance.

Q. And it is entitled "psychiatric rating RFC Form"; is that correct?

A. That's correct.

Q. And as I read it, this calls upon a review psychiatrist to answer yes or no with regard to each of the three items of residual functional capacity.

A. That is correct.

Q. And those items correspond to what is set forth in the regulations.

Now, at the time that this was issued, it was considered an experiment within the Office of Disability Determinations, was it not?

A. That's correct.

Q. And it was your experiment to see if this might lead to perhaps more allowances on medical vocational grounds; is that not correct?

A. That's correct.

Q. And it is also true that this experiment was limited to cases of continuing disability investigations; is that not correct?

A. That is correct.

Q. Which is to say this form was not used in initial applications or for considering reconsiderations.

Now, there were no specific instructions issued [645] for this form, were there?

A. There were instructions. We had a meeting of the psychiatrists. And there were instructions issued to correlate the QED form, which is a form that we rate, what they call the PRF form, Psychiatric Rating Procedure, process.

The psychiatric rating forms go from one to five. And the ratings have to correlate with the other items.

On this form, the RFC form, if the rating were one, which is no impairment, really, we didn't have to fill out the rest of it because this was a denial.

If the check mark on Item B was—B3—was checked off at two, that meant that there was a nonsevere impairment and therefore we didn't have to fill out the rest of the forms; the case was denied.

On Item 3 or 4—that is, on the same form—for the QED, if our rating came out to three or four, then we would have to follow the rest of this form, four, five, and six, which includes the understanding and carrying out simple instructions, et cetera.

And if any of these items, in four, five or six, was marked no, then that would have been—that would become an allowance. We call it a medical vocational allowance.

If the checkoff was a number five, above, then—[646] then this was the total rating, that was an allowance, that meant the listings, so the rest of the form didn't have to be filled out, but this form made life a lot simpler for our review physicians.

Q. Now, whenever you said you utilized the psychiatric review form, did you mean you used the numbers on the psychiatric review form to give you the data by which to check the boxes on the residual functional capacity form?

A. That's correct.

Q. Is that correct?

A. That's correct.

Particularly if it was rated three or four, and then we would be able to consider medical vocational factors. And this was spelled out for us in the Items four, five and six.

Q. Now, did you follow the instructions that were in the program operations manual system for the use of the psychiatric review form?

A. Yes, we did.

Q. Was it not your understanding of those instructions that if you had a four or a five total psychiatric rating on the psychiatric review form, that the person was considered to be deemed capable of unskilled work?

A. I'd like to correct that.

If the QED or PRF form, the psychiatric review [647] form, was checked off as a five—

Q. Excuse me. A three or a four is what I meant.

Is it not your understanding if it was a three or a four total psychiatric reading that the person was deemed to be capable of at least unskilled work activities?

A. That's possible. But it would depend again on the RFC.

In other words, in the rating of three or four we would have to go to the RFC, and those are the ones – and three or four – who could be considered for medical vocational allowances or denials, whichever –

Q. Are you aware of how this experiment turned out, whenever these cases were reviewed by the Social Security reviewers in the New York region?

A. You are speaking about the Federal reviewers?

Q. The Federal review.

A. In general, many of these were accepted. Now, I had to review, when I came into operations, assigned to operations, I had to consider the returns from the Federal Government and help to rebut that, if necessary.

But with these forms it didn't create much difficulty.

Q. I would like to show you what has been marked in evidence as Plaintiff's Exhibit 25.

THE COURT: Excuse me. I have a 4:30 meeting of [648] a whole host of people and how long is this going to continue?

MR. BERGDALL: I believe that I will be through by 4:30, your Honor. I don't know if there is redirect.

THE COURT: Okay. Go ahead.

Q. I would like to show you what has been marked as Plaintiff's Exhibit 25.

Have you seen that before?

A. No. Not this one. I've seen others later on but not this one.

Q. This is the type of report that you at the Office of Disability Determinations got back from the regional office of the Social Security Administration on your so-called accuracy.

Is that not correct?

A. Yes, these are reports.

Q. I would like to call your attention to Page 5 of this exhibit and read for you the following language, which I believe is in the second and third paragraphs.

"Decisional accuracy for initial mental cases allowed on a combination of medical vocational factors was only 66.7 percent. C-1 allowances accounted for 25.8 percent of initial and 23.1 of reconsideration group one, mental returns."

Now, C-1 allowance is a medical vocational [649] allowance; is that not correct?

A. Yes.

Q. It further says, "The biggest problem in definition C-1 allowance involves claimants mostly of advanced age and the 0304 psychiatric impairments who retain the ability to engage in a broad range of unskilled work at all commercial levels. These cases conform to H-1 or J-1 denials and were returned by the DAB, which is disability analysis branch?"

A. That's correct.

Q. Under the category of 01, for reversal of the decision.

Doctor, do I understand those two sentences to say correctly that a significant number of medical vocational allowances which had been allowed by Office of disability determinations were rejected by the Federal Social Security Administration?

A. It appears that way. I haven't seen this report until now.

Q. Thank you.

Now, the last change that you said took place was within very recent months, I believe you said October, 1982; is that correct?

A. Yes.

Q. With issuance of a new Federal form for assessment [650] of residual functional capacity.

After that time it is fair to say that there are more medical vocational allowances still, even than there were in the period from April to October, 1982.

A. A great many more.

Q. Do you have an estimate how many more?

A. I have no estimate. But passes through my desk many more medical vocational allowances, which I rarely saw prior to the end of February, 1982, and more than those from February, '82 until October, '82.

Q. Do you feel more or less comfortable with the current adjudications than you did with the previous?

A. I certainly do.

Q. More uncomfortable with the current?

A. With the current.

Q. Finally, you work with Dr. Theodore Cohen, do you not?

A. Yes.

Q. And you are in fact under his supervision?

A. In a way.

Q. Would you say for the most part your understanding of Social Security policy with regard to adjudication of claims is consistent with his?

A. Yes, it is.

Q. During all three of these period was there any [651] change, to your knowledge, in the published Social Security regulations as to how mental claims should be adjudicated?

A. Not to my knowledge. You are speaking about the Federal guidelines?

Q. Yes.

A. No, no change.

MR. BERGDALL: One moment, your Honor.

Q. Doctor, there is one other exhibit that I would like to show you, which has been marked in evidence as Plaintiff's Exhibit 23. I would like to show it to you and ask you to take a look at it.

THE COURT: What's the question?

Q. Have you seen this document before?

A. No, I haven't.

Q. You have not seen this before?

A. No.

Q. Would it come as a surprise to you if I indicate on the page labeled Tab C, Question 3"—did you find that?

A. Yes.

Q. Would you read to yourself Question 3 and the answer that was given at that time.

Now, that question and answer state, does it not, that there can never be a medical vocational allowance in the absence of adverse vocational factors, does it not? If it understand it correctly.

[652] A. That's the first sentence, and then there's some qualifications, the next sentence.

Q. What qualification do you consider significant, Doctor?

A. That the degree of adversity required, however, is determined in conjunction with the RFC, and all three vocational factors need not be adverse to warrant an allowance when the RFC is markedly reduced.

Q. By vocational fac rs, you understand that to mean considerations of age, education and work experience, is that correct?

A. Yes.

Q. Does this statement reflect your understanding of Social Security policy as it existed in November of 1982?

A. That's difficult to answer. I'm not sure whether I understand. Is this a policy of the New York State ODD, or is this a policy of the Federal DAB?

Q. Does this reflect your understanding of the Federal Social Security policy as of November of 1982?

A. I believe it does reflect that. However, we went along with the experimental program and went along with the new RFC, and it doesn't seem to reflect this.

MR. BERGDALL: No further questions.

MR. KOOLYK: Doctor, among the claims that are [652a] reviewed that reach you—withdrawn. No redirect.

THE COURT: Thank you very much, Doctor.

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[656] THE COURT: Do we have another witness?

MR. KOOLYK: Yes. Defendants call Jean Hinckley.

JEAN HALL HINCKLEY, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. MANCHER:

Q. Ms. Hinckley, where are you employed?

A. At the Social Security Adminstration in Baltimore.

Q. And how long have you been employed by the Social Security Administration?

A. Twenty-two years.

Q. What is your present position at the Social Security Administration?

A. I'm the acting deputy associate commissioner for disability.

Q. Could you explain where in the structure of the Social Security Administration your position and your particular office fits in?

A. Yes. The Commissioner has several deputies, one of whom is the deputy for policy and programs, and under that deputy are the officers which make the policy for the Social Security Administration. The office of disability, [657] the office of retirement survivors insurance, the office of supplemental social security, and some others. I'm with the office of disability.

Q. And to whom do you report? Who is your immediate supervisor.

A. The associate commissioner for disability.

Q. What are your responsibilities as acting deputy commissioner?

A. We make policy for the disability program and we also provide oversight of the state agencies which actually made the disability decisions on behalf of the secretary.

Q. Could you briefly describe what you mean by the oversight of the state agencies?

A. Well, there are agencies in every state, more than one in some states, which actually make the disability decisions on behalf of the secretary.

We provide all policy guidance which they must follow.

And we also provide budgeting. They are fully federally funded. And we provide budgeting guidance and we provide training and we provide management oversight, but we do not tell them how to run their day-to-day operations.

Q. Did there come a time within the last few years when you becamc aware of concerns in the area of adjudication of mental impairment claims?

[658] A. Yes. I think it's a direct result of the 1980 amendment mandate from Congress which required us to reexamine every single person on the roles.

Congress was concerned, based on the report from the general accounting office, which indiciated that as many as 20 percent of all the people on the disability roles should not be there.

So they passed a provision in the 1980 amendments which called to Social Security to begin in January of 1982 looking at every person on the roles every three years, unless that person's impairment was considered permanent.

If the impairment was considered permanent, we were required to look at them on a schedule to be determined by the secretary.

So we suddenly found ourselves in a situation where we were expected to look at 4.8 million people over a three-year cycle, not counting the permanents. Some reduction from that number would be the permanent impairments.

And we began the activity, actually, early. The Congressional Mandate said we had to begin it by January of '82. We actually began it in the spring of 1981.

And I would think that by early 1982 we had become aware that we had a problem.

Q. In what ways were you made aware of a problem?

A. Well, when we got this amendment we spent a lot of [659] time figuring out which people we should look at first.

But I don't think any of us was aware that we didn't know everything we needed to know in order to conduct the continuing disability reviews.

We have always conducted continuing disability reviews, but only with those people whose impairment we expected to get better within about a year after the original entitlement.

So the only two people we had looked at up until that point were special entitlement cases and these continuing disability cases, but only within a year of entitlement.

Suddenly we were facing a problem of looking at people who had been on the rolls five years, ten years, fifteen years, sometimes longer. And I think that we assumed that we would handle the continuing disability reviews in essentially the same way we had always done it for the one-year people, and we began to be aware that that just didn't work.

To answer your question, there were complaints by the public, through their Congressmen, and direct, about the way we were doing continuing disability investigations. The news media was anything but kind in their reporting of the activities, and we had some very unfortunate incidents of people committing suicide and doing other acts of violence in response to the news that there was going to be a [660] continuing disability review undertaken of their case.

They had really believed that they had "retired on disability," and it had not occurred to them that at some point in time we might suddenly question that entitlement and take away that money they had become dependent on.

So there was quite a public outcry on the whole question of—

Q. What, if anything, did Social Security do in response to what you have just described as a public outcry?

A. Well, in my judgment we've done an awful lot.

One of the first things that was done was we realized that the method that we had used to conduct a continuing disability in the past wasn't working.

The way we had done it in the past was to send each person a letter informing him that we were going to do a continuing disability review, and asking them to fill out sort of a status report on whether he was working, how his impairment was doing, whether he had any new treating sources and that sort of thing.

And people were reacting badly just to receiving this letter.

The letter was not a threat of anything. It was just the beginning of the continuing disability activity.

So a decision was made by the commissioner that we would go instead to a face-to-face meeting with each [661] person as we begin the continuing disability review, so that he could be reassured that this is not instant termination of benefits; this is merely the beginning of a continuing disability review.

Q. When would this face-to-face meeting occur?

A. At the very beginning—it's the very first thing we do in a continuing disability review, send them a letter and ask them to come into the district office, and then the district office undertakes this review with the person to assure him that all this is an attempt to get at the question of whether his disability continued or not.

Q. Have there been any other ways in which Social Security has responded to the concerns in this area?

A. Yes. Another thing that we did was to greatly expand the form that's filled out to get at the status of the claim so that we could make absolutely sure that we got all relevant information about his current activities, about any work activity that he had done, about any medical sources that he had seen and so on.

Another thing was that a mandate went out that in every continuing disability case all past medical evidence for the year preceding the beginning of the continuing disability review had to be secured. And then whatever additional evidence behind that would also be secured as needed.

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[858] THE COURT: Do you have another witness?

MR. KOOLYK: We have two short witnesses.

THE COURT: Put them on, please.

IRWIN FRIEDENBERG, called as a witness, having been first duty sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MS. MANCHER:

MS. MANCHER: These are two additional exhibits.

THE COURT: What are they?

MS. MANCHER: AA and BB.

THE COURT: Thank you.

MR. BERGDALL: No objection

THE COURT: In evidence.

(So marked)

Q. Where are you presently employed?

A. Office of Hearings and Appeals.

Q. In what capacity are you—

THE COURT: I didn't hear that.

THE WITNESS: Office of Hearings and Appeals, Social Security Administration.

Q. What capacity are you employed there?

A. I'm the Deputy Chief Administrative Law Judge.

Q. How long have you held that position?

A. Two years.

[859] Q. Have you held any other positions within the Social Security Administration?

A. I've been a practicing Administrative Law Judge for two years and member of the Social Security Appeals

Council for approximately ten years and I've held various positions in the Office of Hearings and Appeals since 1961.

Q. During what period of time were you a practicing Administrative Law Judge?

A. From May of 1980 until the fall of 1981.

Q. In that capacity as a practicing Administrative Law Judge did you evaluate claims of mentally impaired individuals?

A. I did.

Q. Could you explain to the Court the duties of your present position as Deputy Chief Administrative Law Judge?

A. Basically, I'm the deputy to the Chief Administrative Law Judge who has the overall responsibility for overseeing a corps of 800 Administrative Law Judges located in 135 or so locations throughout the country. Our principal duties are to advise the Chief Judge and Associate Commissioner for Hearings and Appeals on various policy matters involving regulations, the stature, rulings, in terms of how they impact on the hearing processes.

I'm also involved in the development and [860] implementation of a continuing legal education program for our Administrative Law Judges.

Q. Could you explain the relationship between the Social Security Administration and the Office of Hearings and Appeals?

A. The Office of Hearings and Appeals is one of the components of the Social Security Administration, headed by an Associate Commissioner who reports to the Commissioner of Social Security, the agency, the Office of Hearings and Appeals, is principally a part of the Social Security Administration for administrative budetary purposes.

The decision-making portion of the—the decision-making function of the Administrative Law Judge is by direct allocation from the Secretary of Health and Human

Services. By statute the Secretary is charged with the holding of hearings and she has delegated that authority to Administrative Law Judges and to the Appeals Counsel for those cases that are appealed beyond the hearings level.

Q. To Administrative Law Judges in the Office of Hearings and Appeals hold hearings involving issues other than Social Security or SSI disability?

A. Yes, we're also responsible for holding hearings in Medicare cases that come out of the Health Care Finance Administration. Also, our judgments from time to time are assigned cases from the Office of Personnel Managements' [861] Office of Hearings and Appeals and appeals that have no relationship with the Social Security Administration at all.

For example, a number of years ago our Judges handled a number of Civil Rights cases that were involved administratively in proceedings.

Q. What is the nature of the review by the Administrative Law Judge of the Social Security claim?

A. Generally a claimant requests a hearing from a determination having been made by the Social Security Administration that he or she was not entitled to disability benefits. The files would come into one of our hearings offices and be assigned to an Administrative Law Judge. Basically, the Judge will review the file prior to the scheduling of the hearing to determine whether or not there are additional sources of evidence that may be reflected in the file but have not submitted evidence; determine whether or not there is a need for any expert witnesses, such as a medical advisory or vocational expert at the hearing. When he's satisfied the case is ready for a hearing, he will have the case scheduled.

The hearing will be held, all testimony taken, quite frequently the record is left open after the hearing for receipt of additional evidence that the claimant may wish to submit or the Judge may wish to obtain and then [862] ultimately issuing a decision.

That review is basically a de novo review.

Q. Could you explain that term?

A. The determination of the state agencies are made and are of record in the case; however, the Administrative Law Judge has the responsibility to inquire fully and issue independent decision without regard to what took place at the initial or reconsideration level. The Judge's decision is an initial decision, not a decision that either affirms or rejects or adopts a state agency's determination. It is an initial decision based on all the evidence that has been accumulated and is in the record.

Q. Once the hearing is held by the Administrative Law Judge in the Office of Hearings and Appeals and all the evidence, medical and other evidence is obtained, could you explain the adjudication process that takes place?

A. I thought I just did.

Q. Could you explain the method of adjudicating a claim in a decision?

A. I see.

Generally in a disability claim the Administrative Law Judge is bound by the law, Social Security regualtions and the Social Security rulings.

In reaching a decision in a disability case, he or she must apply the sequential evaluation processes [863] in reaching a decision, a disability decision. The sequential process is basically a five-step process which determines the ultimate outcome of the case.

The first step involves a question of whether or not the claimant is engaging in substantial gainful activity. If the record shows the claimant is not engaging in substantial gainful activitiy, the Administrative Law Judge then must determine whether or not the impairment is a severe im-

pairment as defined by the regulations; one that results in limitations of basic work-related functions and if the case is a non-severe impariment, the claim could be denied on that basis at that particular step.

If the Judge determines it is severe, he or she would go to the next step in the process, that is deciding whether or not the claimant's impairments meet or equal the level of severity contemplated by the listings.

If the determination is that the claimant does meet or equal the listings the case is allowed at that point. If the Judge determines that the impariments do not meet or equal the listings, he then must assess the claimant's residual functional capacity to determine whether or not the claimant can resume his past relevant work or whether or not there's other work the claimant can do.

That's basically a five-step process.

Q. In connection with some of the steps you've [864] just mentioned, are you familiar with the Social Security rulings?

A. Yes.

Q. I believe you testified that Social Security rulings are binding on the ALJ's?

A. That's correct.

Q. Calling your attention to Defendant's Exhibit AA, which is in front of you on your left, Social Security ruling 82-56, Title 2 and 16, sequential evaluation process, does this ruling contain adjudicative policy which is binding upon Administrative Law Judges?

A. Yes.

Q. Specifically calling your attention to Page 114 of Defendant's Exhibit AA, the top of the page which states "A finding of ability to engage in any SGA cannot be justified solely on the grounds that the impairment does not meet or equal the level of severity depicted by the listings."

Are you familiar with this?

A. Yes.

Q. Is this consistent with the policy in the Office of Hearings and Appeals, as you know it?

A. This is consistent with policy, long standing policy in the Office of Hearings and Appeals, yes.

Q. How long standing?

A. As long as I've been in the organization.

[865] Q. How long has that been?

A. Twenty five years or twenty three years.

Q. With respect to the residual functional capacity assessments that you mentioned, are you aware of any policy guidelines which address themselves to residual functional capacity which are binding on Administrative Law Judges?

A. The only policies that are binding are those that are reflected in the regulations and rulings, there are some rulings that deal with a receiving residual functional capacity.

Q. In front of you I refer to Plaintiff's Exhibit 37 which is Social Security ruling 83-16, Titles 2 and 16, residual functional capacity for mental impairments.

Are you familiar with this ruling?

A. Yes.

Q. Could you explain the impact of this Social Security ruling on adjudication by Administrative Law Judges?

A. I think it probably highlights something that Administrative Law Judges have been doing for many years, as long as they've been deciding cases. I think it sets down specifically those factors that are considered of RFC assessments that may not have been previously laid out specifically in any binding guidance but generally reflects, in my opinion, pretty much what Administrative Law Judges have been doing all along in assessing residual [866] functional capacities.

Q. According to this Social Security ruling, what specific factors are considered in determining residual functional capacity?

A. For mental cases?
Q. For mental cases.
A. In determining residual functional capacity, basically you're looking principally at the medical evidence in terms of how the impairment impacts on the ability of the individual to perform certain mental functions. You're looking at the claimants – at the hearing level you're looking at the claimant's testimony, particularly with regard to such activities as his daily activities, his similar functions in determining how consistent that testimony is with the medical evidence.

You're coming up within an assessment what the claimant can do or not do based on his mental impairment. Of course, the hearing level we generally see a lot of conflicting evidence so the Administrative Law Judge must resolve whatever conflicts exist in the evidence, particularly the medical reports, and determine what weight he will give to various medical boards in making his assessment.

Q. What types of medical evidence, medical reports would an Administrative Law Judge have before him or her in the claimant's file?

[867] A. Generally, but not in all cases, you always have medical reports from a treatment source, treating physician if there is one. You'll have medical records from any hospital or clinic that the claimant may have been treated at. You might have a consultative examination obtained by the state agency but quite frequently some of the records that we do get at the hearing level give us indications of other treatment sources that may not have been contacted.

In order to inquire fully, the Administrative Law Judge should obtain all relevant evidence that may be pertinent to this particular claim and does, indeed, develop either pre- or post-hearing for any missing evidence in the file.

Q. Are residual functional capacity assessments completed by state agency's review physicians, a part of the record?

A. Generally, yes.

Q. I would like to call your attention to Defendant's Exhibit BB, Social Security ruling 82-30, Titles 2 and 16, responsibility for residual functional capacity assessments.

Are you familiar with this ruling?

A. Yes.

Q. According to the policy set forth in this ruling, who in the adjudication process has the responsibility [868] for assessing residual functional capacity?

A. At the state agency level it is the responsibility of the program physician. At the hearing level, it is the responsibility of the Administrative Law Judge and at the review level itself the responsibility of the Appeals Counsel.

Q. Based upon this Social Security ruling as well as your own practice as Administrative Law Judge, your own knowledge of Administrative Law Judge procedures, what is the significance of the residual functional capacity assessment that is completed by the state agency's review physician?

A. It is evidence. It is evidence that should be given some consideration but it is treated generally the same as any opinion evidence. The weight that would be accorded it would be dependent upon the extent to which it is supported by the objective medical findings and other evidence in the file.

Q. Is this policy that you just started, set forth in this Social Security ruling?

A. I beleive it is on Page 127.

Q. Could you read it?

A. "When making the RFC assessment, the Administrative Law Judge of Appeals Counsel will give probative weight to the DDS staff physicians RFC assessment, although it [869] is not binding, it is a medical judgment and constitutes expert opinion evidence."

Q. Are you familiar with a determination involving a named plaintiff in this action which illustrates the policy you've just stated?

A. To the extent that you showed it to me earlier, yes.

[870] Q. I would like to show you Plaintiff's Exhibit 46 which is the claim or part of a claim file of Mr. Richard Roe I.

Have you reviewed that decision?

A. No.

Q. Have you read parts of that decision?

A. Parts that you referred me to, yes.

Q. Calling your attention to the Administrative Law Judge decision, page four of the Administrative Law Judge decision, sir, could you read the highlighted sections of that page with respect to residual functional capacity assessment?

A. "In arriving at this decision, the undersigned has considered a statement of residual functional capacity opined by a review physician of the New York State Bureau of Disability Determinations on November 6, 1981 and find it to be wholly inconsistent with the psychiatric evidence of record."

Q. Is that language familiar to you?

A. I've probably used it myself on occasion, yes.

Q. In what instances?

A. Where I have, in effect, rejected the opinion of a DDS staff physician regarding residual functional [871] capacity.

Q. In your opinion, is it common for such assessments to be rejected by Administrative Law Judges?

A. I can't really tell you—

Q. In your own experience?

A. I have rejected them on numerous occasions, yes.

Q. Turning your attention to the area of mental impairments, in particular—withdrawn.

Are you familiar with the Program Occupational Manual System, also known as POMS?

A. Yes.

Q. What part does it play, if any, in the adjudication process at the office of hearings and appeals?

A. No.

Q. Could you explain?

A. The POMS are, as I understand, are the operating guidelines for the DDS, disability determination. They contain a lot of policy guidance as well as administrative guidance on how to process cases at the initial reconsideration level. They are not part of the material that is used by the Administrative Law Judges in deciding disability cases under Social Security.

Q. Are you familiar with program circulars?

A. I'm aware of program circulars. They also are not—I don't think they're distributed—I'm sure they're [872] not distributed to our Administrative Law Judges. They have no effect or they're not a criteria at all in deciding cases. They're not used at all by Administrative Law Judges in making determinations.

Q. Does the same hold true for informational digests?

A. Yes.

Q. I would like you to turn to Plaintiff's Exhibit 7 which is informational digest number 79-32 dated April, 1979.

Are you familiar with this document?

A. No.

Q. To the best of your knowledge, was this distributed to the Office of Hearings and Appeals?

A. It was not.

Q. Referring to Plaintiff's Exhibit 8, which is Informational Digest Number 79-34 dated April, 1979, are you familiar with this document?

A. No, I'm not.

Q. Was this distributed to Administrative Law Judges?

A. As far as I know, it was not.

Q. Finally, if you would look at Plaintiff's Exhibit 13, which is regional SSA program circular number 8-80 dated June 10th, 1980, are you familiar with this document?

A. No, I'm not.

Q. To the best of your knowledge, was this ever [873] distributed to the Office of Hearings and Appeals?

A. It was not.

Q. One final exhibit I would like you to turn to, that's Plaintiff's Exhibit 3 which is the Psychiatric Review form or QED.

Have you ever seen this document before?

A. No.

Q. Do you know if it's incorporated in files of claimants at the Administrative Law Judge stage?

A. I understand that in some instances it is. When I was holding hearings, I did not see this form at all in any cases that I decided, but I understand since I have left, since I've been holding hearings or stopped holding hearings, that this form is used and does appear in the files that come before Administrative Law Judges, yes.

Q. Is it used in any way by the Administrative Law Judges?

A. To the best of my knowledge, it is not.

Q. How do you know that?

A. When certain questions came up from our Administrative Law Judges about the use of this form, they were advised that they were not—that this document was not to be given any evidentiary weight whatsoever. They could exclude it from the record or they could include it in the record, but it was not to be given any particular weight in making [874] a decision.

Q. In front of U. S. Defendant's Exhibit Z which is in the other pile of papers in front of you—

A. Z?

MS. MANCHER: Excuse me. That's Defendant's Exhibit X.

THE COURT: What?

MS. MANCHER: X. I'm sorry.

Q. This contains page 140 from the hearings before the Special Committee on the Aging for the United States Senate, 98th Congress, first session, April 7th and 8th, 1983.

On page 140 is an excerpt from Mr. Paul Simmons' testimony before the committee. Do you know who Paul Simmons is?

A. Yes, he was formerly the Deputy Commissioner of Social Security Administration.

Q. Have you seen this testimony and information of this testimony before?

A. No, not to my recollection.

Q. In this testimony,sir, Mr. Simmons gives percentages with regard to reversal rates by the Administrative Law Judges, specifically on continuing disability investigation cases.

Do you in your capacity as Duputy Chief [875] Administrative Law Judge have any knowledge with regard to the reversal rates by the Administrative Law Judges?

A. Yes.

Q. Could you tell us based upon your information what the percentage—what the reversal rate by the Administrative Law Judges are in CDI cases?

A. No, I can't.

Q. Do you know, in general—

A. Generally the reversal rate is somewhere between 50 and 55 percent of all cases. In other words, the Administrative Law Judges are allowing approximately 50 to 55 percent of all appeals taken to them.

Q. That's based on updated information?

A. Yes, but it's not based on anything that I saw within the last few days or few weeks.

MS. MANCHER: Thank you, no further questions, your Honor.

CROSS-EXAMINATION

BY MR. BERGDALL:

Q. Mr. Friedenberg, as I understand your testimony, it was to the effect that at the lower agency levels the person who makes a determination as to residual functional capacity is the review physician within the state agency; isn't that correct?

A. Yes.

[876] Q. In fact, the review physician is the only person who really specifically addresses the question of residual functional capacity; is that correct?

A. At the initial and reconsideration level.

Q. Whenever a consultative examination is purchased by the Social Security Administration, for example, that physician does not address the specific question of residual functional capacity?

A. Correct.

Q. Whenever you see a form filled out or a memorandum addressing residual functional capacity from a review physician you assume that's based on his or her own expert opinion, do you not?

A. That's correct.

Q. You give weight to that?

A. Correct.

Q. In fact, the exhibit that you just referred to, Exhibit BB, as I believe it was, expressly directs Administrative Law Judge to give weight to that finding of residual functional capacity?

A. Yes.

Q. As I further understand, you've never seen the informational digests or regional program circulars or state agency memoranda that are in evidence in this case; is that correct?

[877] A. That's true.

Q. You have no indication that the residual functional capacity assessment by the review physician is based on anything other than his or her own expert opinion, do you?

A. I have to assume it's based on his review of the evidence in the file, his opinion of what that evidence reflects in terms of function, yes.

Q. I want you to assume, hypothetically, that a review physician had been directed to find residual functional capacity to work if a person did not meet or equal the listings.

If that were the case, you would never know that, would you?

A. That's true.

Q. If you did know that to be the fact, you would give considerably less weight to that assessment of residual functional capacity than you would otherwise, wouldn't you?

A. It would be even less than that. It would be no weight.

Q. Are mental adjudications any more or less difficult than other adjudications that you have to make?

A. Yes, I would say that they are.

Q. Frequently you have to rely on your common sense, perhaps, even more in a mental case than in another case [878] to determine whether a person can work; isn't that true?

A. Not so much common sense. I think the difficulty in the mental cases, basically, is the adequacy of the documentation and the claimant's ability to furnish that type of documentation. I think Administrative Law Judges, particularly, with an unrepresented claimant probably has even a greater burden than he ordinarily has in the regular non-mental case in assuring that the record is complete, that all pertinent testimony is elicited. I think the Judge ordinarily bends over, if you want to say, bends

over backwards, they may do so in the mental cases more so than, let's say, other types of cases.

Q. How many cases do you know or do you have an unrepresented claimant?

A. Today we're getting more and more representation. I think our national average is close to 70 percent now, I think. I haven't seen anything recently, but I believe it's pretty much close to 70 percent. Frequently, speaking from my own personal experience, if I had a claimant that came before me who I questioned their capacity to pursue the appeal, I would refer that individual to the local Legal Aid for representation. I've done that on many occasions.

Q. Over the years, though, it's not infrequent that you've had unrepresented claimants?

[879] A. No, we have unrepresented claimants, yes.

Q. Frequently claims are represented by what you might describe as inexperienced counsel; isn't that the case?

A. Frequently, yes.

Q. Mr. Friedenberg, do you know what percentage of all people who are denied Social Security or SSI benefits or who are terminated from benefits actually appeal to the Administrative Law Judges?

A. I don't have that figure. That figure is available, but I don't have that figure.

MR. BERGDALL: No further questions.

THE COURT: Any redirect?

MS. MANCHER: No, sir.

THE COURT: Thank you.

PLAINTIFFS' EXHIBITS

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C.

FOR EXPECTED RELEASE
THURSDAY, APRIL 7, 1983

STATEMENT OF
PETER J. McGOUGH, ASSOCIATE DIRECTOR
HUMAN RESOURCES DIVISION
BEFORE THE
SPECIAL COMMITTEE ON ACTING
UNITED STATES SENATE
ON
SOCIAL SECURITY ADMINISTRATION'S
PROGRAM
FOR REVIEWING THE DISABILITY OF PERSONS
WITH MENTAL IMPAIRMENTS

Mr. Chairman and members of the Committee, we are pleased to be here today to discuss the Social Security Administration's (SSA's) current process for determining whether persons with mental impairments qualify for disability under SSA's two disability programs.[1] As you know, the actual adjudicative process is carried out by the various State Disability Determination Services (DDSs) following SSA guidelines and instructions.

In an August 18, 1982, letter to us, you requested that we thoroughly examine SSA's decision-making process. You expressed concerns that individuals, who were not found to qualify by meeting specific medical criteria, were not being afforded a realistic evaluation of their capacity for work. You also stated the concerns of mental health organizations that (1) SSA's medical criteria do not reflect current professional standards and nomenclature, (2) the methods for evaluating an individual's capacity to work fail to reflect good professional practices, and (3) many decisions are based on insufficient medical documentation,often on one brief consultative examination.

We began our work in September 1982 by thoroughly reviewing the Social Security Act, the corresponding regulations, and the decision-making process and criteria used by SSA to adjudicate mental disability claims.

We conducted our work at five DDSs in Illinois, Indiana, Ohio, and Pennsylvania; at SSA headquarters in Baltimore, and at a regional office in Chicago. We visited Pennsylvania because your staff expressed interest inactivities in that State. The other States were selected because of their proximity to our Cincinnati Regional Office, where we have staff experienced in auditing disability matters.

At each DDS we met with the Director, the Chief

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[1] SSA administers two disability programs—the Social Security Disability Insurance program and the Supplemental Security Income program.

Medical Consultant, and the Medical Administrator. Overall, at the five DDSs, we interviewed 38 claims examiners individually, and more than 200 examiners in group discussions, 18 supervisors, 8 quality assurance chiefs, and 7 medical coordinators.

Our work at SSA included reviewing disability cases previously selected for review by SSA's quality assurance staffs. We also discussed adjudicative policies and procedures with disability program officials and several SSA physicians, including Chief Medical Officer and the Chief Consultant for Psychiatry and Neurology.

In addition, we reviewed a total of 159 mental disability cases that had been recently adjudicated by SSA—130 of the cases were denials and terminations and 29 were allowances and continuances of benefits. We selected the cases from those available during our visits to the various locations and, as such, the results of our case reviews are not statistically representative of all cases adjudicated at the locations and are not projectable to the universe of SSA mental disability decisions. Of the cases selected, 40 denials or terminations were examined in detail by GAO's full-time clinical psychologist and mental health advisor.

Although our detailed case review is not projectable to the universe of all mental disability cases adjudicated, our findings have national implications. Our additional work and evidence gathered at SSA headquarters strongly indicate that what we found is happening across the nation.

To provide a proper context for discussing the results of our review, I would like to explain briefly the evolution of events that preceded our review.

BACKGROUND—EVOLUTION OF EVENTS

In March 1981,[2] GAO reported to the Congress that SSA had not adequately followed up to verify that disability insurance beneficiaries remained disabled. The

[2] "More Diligent Followup Needed to Weed Out Ineligible SSA Disability Beneficiaries," HRD-81-48, March 3, 1981.

report said that, based on a nationwide sample case review conducted in 1979 by SSA, as many as 20 percent of the persons on disability rolls were not disabled. SSA conducted a follow-up study in 1980 and 1981 and found that 26 percent of the beneficiaries on the rolls during July/September 1980 were not disabled.

Although we did not attempt to independently validate SSA's disability decisions in its initial study, our own study results showed that because of inadequate investigations and lack of follow-up on persons who were expected to medically improve, SSA had allowed non-disabled persons to remain on the disability rolls. SSA's initial study, performed by experienced examiners and physicians, provided the only available estimate of the problem's magnitude.

Congressional concern over SSA's medical reexaminations and other inadequate review procedures led to the enactment of Section 311 of Public Law 96-265, known as the Social Security Disability Amendments of 1980. This section required that beginning January 1, 1982, SSA review, at least once every 3 years, the status of disabled beneficiaries whose disabilities have not been determined to be permanent. SSA began the reviews in April 1981. We said in our March 1981 report that resources were currently being used to review the continuing eligibility of Supplemental Security Income (SSI) recipients, and suggested they be shifted to reviewing the Disability Insurance (DI) rolls because of the higher benefit levels.

In previous testimonies regarding SSA's disability reexamination efforts,[3] we discussed the high termination rate, which was in excess of 40 percent through 1981 and 1982 (currently the termination rate is about 44 percent).

[3] We provided testimony on May 25, 1982, to Subcommittee on Oversight of Government Management, Senate Committee on Governmental Affairs. We also testified on August 18, 1982, before the Senate Finance Committee.

Part of this high termination rate included people who had recovered and others who perhaps should never have received disability benefits. We pointed out, however, that many individuals losing their benefits had been on the rolls several years, still had severe impairments, and had experienced little or no medical improvement. We concluded that many of the terminations were caused because of a changed adjudicative process and climate, and poor State agency medical development practices.

CURRENT CONDITIONS

Data from SSA's files[4] indicate that, as of August 1982, SSA had reexamined in its periodic review process about 305,400 individuals and terminated benefits in about 134,500 (or 44 percent) of the cases. About 74,800 cases reviewed involved persons with mental impairments and 31,700 (or 42 percent) of them were terminated. Of the 31,700 terminations, about 13,400 (or 42 percent) requested a reconsideration. Between June 1981 and August 1982, only 1,400 of the mental disability reexamination cases had their decisions reviewed by administrative law judges (ALJs). At the reconsideration level the DDSs sustained the termination decision in 76 percent of the cases. At the ALJ level 91 percent of the decisions were reversed and the claimants' benefits were reinstated.

Our current review reveals many of the same conditions we reported earlier and generally confirmed the concerns you raised in your August letter to us. Although the scope of our review was limited, we found many individuals who had their benefits terminated despite having severe

[4] In December 1982 we obtained SSA's computer file (based on completed SSA Form 833's—"Cessation or Continuance of Disability or Blindness Determination and Transmittal") of CDI actions for Disability Insurance recipients. The most recent data in the file were through August 1982.

impairments, and in our opinion, having little or no capability to function in a competitive work environment. We had 40 of the denial and termination cases reviewed by our clinical psychologist and she concluded that in 27 of the cases the individuals could not function in their daily living without support and could not work in a competitive or stressful environment. In an additional 13 cases she concluded that more medical or psychosocial information or trial work experiences were needed to make an infomed decision. Several cases illustrating the reasons for our concerns about the appropriateness of the decisions to terminate benefits are summarized in an attachment to this testimony.

Our review revealed several weaknesses in SSA's and the DDS's adjudicative policies and practices. Specific weaknesses we identified were:

(1) an overly restrictive interpretation of the criteria to meet SSA's medical listings, resulting principally from narrow assessments of individuals' daily activities;
(2) inadequate development and consideration of a person's residual functional capacity and vocational characteristics;
(3) inadequate development and use of existing medical evidence, resulting in an overreliance and misuse of consultative examinations; and
(4) insufficient psychiatric resources in most State DDSs.

These problems are discussed in more detail below.

OVERLY RESTRICTIVE INTERPRETATION OF SSA'S MEDICAL CRITERIA

SSA's regulations contain a set of medical evaluation criteria—referred to as the medical listings—describing impairments that are presumed to be severe enough to prevent an individual from working. If a person meets the criteria, he or she is awarded disability.

Mental impairments in the listings are categorized as: (1) chronic brain syndromes, (2) functional psychotic disorders, (3) functional nonpsychotic disorders, and (4) mental retardation. With the exception of mental retardation, the listings for mental impairments include an "A" part and a "B" part. For example, the listings for a schizophrenic (functional psychotic) disorder include part A—"manifested persistence of one or more of the following clinical signs: depression (or elation), agitation, psychomotor disturbances, hallucinations, or delusions. . .", and part B—"resulting persistence of marked restriction of daily activities and constriction of interest and seriously impaired ability to relate to other people". To be eligible for disability benefits, both part "A" and all of part "B" must be met.

Although the criteria for meeting the medical listings for mental impairments have not changed substantially since 1968,[5] it has become increasingly difficult for mentally-impaired individuals to meet the medical listings. As a result of our case reviews and discussions with examiners in 5 DDSs, the problem focuses principally on part B of the listings. Examiners were concluding that individuals did not meet part B based on very brief descriptions of the individuals' performing only rudimentary daily activities—such as watching television, visiting relatives, fixing basic meals, and doing basic shopping activities. Often little else positive was contained in the medical evidence.

Hard Line Taken by SSA

We asked examiners why they were accepting a few positive signs as support that the individuals did not have a "marked restriction of daily activities and constriction of interests and seriously impaired ability to relate to other people" (as part B requires).

[5] The I.Q. levels for mental retardation were changed in 1979 to "59 or less," instead of "49 or less".

The examiners we interviewed told us it is difficult for them to determine when restriction of daily activities, constriction of interests, and inability to relate to other people are severe enough to meet the listings. The examiners also said SSA is taking a hard line in interpreting the criteria.

How the criteria are applied by SSA is of fundamental importance because cases are evaluated by SSA's quality assurance system, and State agencies look to case returns from SSA's Regional Office Disability Assessment Branches (DABs) as the clearest indicator of SSA's intent. State officials and examiners we spoke with unanimously perceive DAB returns over the past several years as intending to make it extremely difficult to meet the listings, and they have responded accordingly in their decisions. Several examiners told us that it only takes a few returns before you change the way you evaluate evidence.

We found that SSA's quality assurance case returns to the DDSs focused extensively on daily activities and current behavior. We reviewed some of these case returns where the DDS had determined the individuals were very severely mentally impaired and were disabled, but the DAB returned the cases because the individuals had daily activities, albeit extremely minimal ones. The following cases that we reviewed are illustrations of minimal activities which judged as precluding the individuals from meeting the listings:

- A 34-year-old man was diagnosed as having mild mental retardation (I.Q. 61)—chronic brain syndrome associated with convulsive disorder, and slight speech impediment. He had a 6th grade education plus 2 years special education. The only work he had done was as a bathhouse attendant and lost the job because he could not handle it. He was allowed disability in 1969. In 1982 he was reexamined and the DDS decided on a continuance, apparently for meeting the listings.

SSA's quality assurance staff reversed the decision on November 8, 1982, as a termination, because he did not meet the listings. They said he has no significant restrictions in his interest or daily activities, although he showed overt signs of psychotic behavior. The CE report dated September 9, 1982, said he spent his day, "reading, watching television, and taking brisk walks. He does some housekeeping and cooking." The CE report also pointed out that personality tests substantiated organic brain syndrome characterized by perceptual-motor impairment and gaps in thinking. Bender [test] figures were disproportionate and poorly done. He was hysterical in his personality orientation and had poor socialization. He could not trust his own performance and was easily stressed. He could follow simple instructions if there was no stress involved. He lacked intellectual dependability and emotional stability for regular employment.

In our judgment, he met the listings.

– A 50-year-old woman was allowed disability in June 1975, with a diagnosis of depressive reaction. She was reexamined (medical diary) in early 1977 and benefits were terminated in April 1977. She reapplied for benefits and was allowed in September 1978 with a diagnosis of schizophrenic reaction-chronic-undifferentiated type. She was reexamined in December 1979 and the DDS continued benefits. SSA's quality assurance review returned the case as a termination in January 1980 on the basis of a CE report that she got along with family and had a few friends with whom she visited and drank coffee. SSA concluded that she did not meet or equal the listings and had the residual functional capacity to do unskilled work. The same CE report, however, said she had suicide attempts, inappropriate behavior, was withdrawn, was unable to relate to others, could not do simple repetitive tasks for competitive fees, could not understand written or oral instructions, could not socialize with supervisors or co-workers, and could not tolerate work pressures for unskilled work.

We concluded that the CE report supported a decision for meeting the listings based on her impairment and adverse daily activities.

The following comment in a December 1981 letter to SSA's Chicago Regional Office from the DDS Director in Wisconsin addresses the impact of the DAB reviews in setting the adjudicative climate:

> "The current adjudicative climate involving mental impairments seems to be one of deny, deny, deny. The rationales for these denials as promulgated by DAB reviewers, seems to be based on the most minimal possible understanding of mental impairments in terms of their effect on individuals, on the fluctuations involved in the behavior of those with such impairments, and in trying to relate minimal ability to function in activities literally necessary to continued life, with the capability of going out in the competitive world and obtaining and holding a job with the normal stresses, under supervision and with the necessity to be able to perform consistently."

We spoke to SSA's chief psychiatrist and two other SSA psychiatrists about our findings and about the difficulties in making medical assessments of an individual's daily activities (part B). They said to make a severity determination of a person's daily activities it is necessary to evaluate comprehensively the quality of the activity, how often it is done, whether independently or under supervision, with what degree of comprehension, and how appropriate the activity is. Other considerations should include whether the claimant is living independently or in a supervised/structured environment; or is on medication and the effects of it; and whether the claimant is in remission and the time spans between relapses.

Concerns Raised That the Criteria to Meet the Listings Are Overly Restrictive

The American Psychiatric Association (APA), in a letter dated June 29, 1982, to the SSA Commissioner, recommended a change in parts A and B of the listings for all mental disorders other than mental retardation. They recommend a change to part A to eliminate the current requirements that the claimant must manifest active symptoms upon examinations, and require, instead, that examinations recognize and evaluate the nature and severity of the illness even if the signs are not continuously present. The APA also suggested that, where a person evidences one or more of the clinical signs ("A") and demonstrates any two (for functional psychotic disorders) or three (for non-functional disorders) of the "B" criteria, that should be sufficient to establish disability. They also recommend that any evaluation of an individual's daily activities as stated in part B should consider such issues as ". . . . frequency, appropriateness, autonomy and comprehension."

In 1982, the Chicago Region Medical Consultant for SSA wrote that it is:

> "practically impossible to meet the Listings . . . for any individual whose thought processes are not completely disorganized, is not blatantly psychotic, or is not having a psychiatric emergency requiring immediate hospitalization . . . In fact an individual may be commitable due to mental illness according to the State's Mental Health Codes and yet found capable of 'unskilled work' utilizing our disability standards. . . "

Virtually every examiner that we talked with echoed these observations. We were told that to meet the listings an individual had to be actively and continually manifesting clinical signs. Even claimants severely impaired, and currently or recently hospitalized, were found not disabled.

Our group discussions with examiners produced comments to the effect that unless a claimant was "flat on his back in an institution," "comatose," or "in a catatonic state," he or she would not meet the listings. While these statements may be exaggerated, they are indicative of the examiners' perceptions.

RESIDUAL FUNCTIONAL CAPACITY AND VOCATIONAL CHARACTERISTICS ARE NOT APPROPRIATELY CONSIDERED

When an individual fails to meet the listings but the impairment still limits his or her ability to perform basic work functions, SSA's process to determine disability requires that an assessment be made of the individual's residual functional capacity (RFC). In mental impairments an RFC should consider such factors as, "capacity to understand, to carry out and remember instructions, and to respond appropriately to supervision, coworkers, and customary work pressures in a routine work setting." If the RFC assessment finds the individual incapable of doing his or her previous work, an assessment must then be made of the individual's RFC and such vocational characteristics as age, education, and work skills to see if he or she can do other work in the national economy.

As difficult as it is to meet the criteria in the medical listings, the chances of a younger individual getting or sustaining benefits based on RFC and vocational factors is extremely slim. As we found in many of the cases we reviewed, when an individual does not meet the listings, SSA's guidance to the States resulted in a virtual presumption that he or she has the RFC to do basic work activities or unskilled work.

We traced the evolution of this policy guidance back to April 1979 with SSA's publication of Informational Digest 79-32. The digest stated in part that "the capacity for un-

skilled work . . . in and of itself represents substantial work capability and would generally be sufficient to project a favorable vocational adjustment for claimants with solely mental impairments."

SSA's chief psychiatrist elaborated on this issue in a May 1980 memorandum to SSA's New York Regional Office, when he said that a psychiatric impairment rating below meeting the listings signifies the ability to engage in substantial gainful activity at a level of unskilled work or higher. He also said that making an RFC assessment would be "redundant."

This policy was reiterated by SSA's Chief Medical Officer in a November 1980 letter to the Chicago Regional office by stating:

> "Where the overall psychiatric rating is less than meets or equals [the listings] the individual retains a mental RFC for at least some type of unskilled work activity."

This policy guidance was not confined to one or two regions but had national dissemination. At least six other SSA regional offices requested clarification of this policy. SSA's Associate Commissioner for Operational Policy and Procedures responded similarly to the other regions, as indicated in a December 1980 response to the Kansas City Regional Office by stating:

> "In reference to . . . question concerning adjudication of psychiatric cases short of listing severity, with a finding that a mental impairment does not (or does no longer) meet or equal the Listing, it will generally follow that the individual has the capacity for at least unskilled work.
>
> "Accordingly, where it has been concluded that the listing is neither met nor equalled and the inability to perform unskilled work is found, a second look at the medical findings is warranted. If the reassessment of the medical does not support a finding of "meets' (or 'equals') then the restrictions indicated by the functional assessment are overstated and a reassessment of the actual residual functional capacity would be in order".

On March 3, 1981, the Regional Commissioner, Kansas City, wrote to SSA: "Following the logic described in . . . your memorandum, the likelihood of a vocational allowance for a mental impairment would appear to be extremely remote."

We discussed with SSA's Chief Medical Officer, the chief psychiatrist, and two other SSA psychiatrists their rationale for saying that an individual with a severe impairment, who does not meet the listings, still maintains the mental RFC for unskilled work. First, they defined unskilled work (they refer to it now as basic work activity) as work that is tantamount to doing competitive work. They said that a person who does not meet the listings has the cognitive power to do "bottom of the barrel," simple, or unskilled type jobs. If an individual could not perform even unskilled work, he or she should be rated a "5" (meets the listings) on a psychiatric review form and presumed disabled. Less than a "5" means the ability to do simple work. They emphasized that they are not saying the person can, in fact, work. The physician's job, they pointed out, is to make the medical assessment. They told us that the decision to determine a person disabled or not is a vocational decision made by the examiners.

We asked the psychiatrists: "if the examiners are told a person had the mental ability to understand and do unskilled work, could not one logically conclude that a person can, in fact, work, if an unskilled job were available in the national economy?" One of SSA's psychiatrists told us that he can understand how the examiners would reach such a conclusion and that is probably the message that is being sent out to them through SSA's DAB case reviews. He said that he sees cases where individuals get a "3" or "4" rating (severe, but not severe enough to meet the listings)

and are determined not disabled, when he knows the individuals are precluded from competitive work. For example, he said that he was currently reviewing a case involving a mentally retarded woman with an I.Q. in the low 60s. He assigned, according to present procedures, a "4" rating. He said the decision will result in a denial even though he knows that there is no way the individual could possibly work competitively.

Several examiners told us that DAB and other quality assurance returns have given them a clear message to terminate benefits for younger workers who do not meet the medical listings.

Minnesota class action suit

In May 1982 the Mental Health Association of Minnesota filed a class action suit against SSA's policies regarding mental impairments in the Fourth Division Minnesota District Court. The court concluded that,

> ". . . . A new policy was developed by SSA beginning in early 1980 concerning eligibility for mentally impaired claimants. In accordance with that policy, SSA determined that persons whose mental impairment does not meet or equal the Listing of Impairments retain sufficient residual functional capacity to do at least unskilled work."

The court ruled in favor of the Association and said, in part, of SSA's policy that:

> "The policy . . . is arbitrary, capricious, irrational, and an abuse of decretion.
>
> "By use of this policy, the defendant has terminated the benefits of and denied new benefits to class members without proper assessment of the individual's capacity to engage in substantial gainful activity."

As required by the court, the Commissioner, SSA, sent a memorandum to all Regional Commissioners on January 3, 1983, stating in effect that to presume a person

who does not meet or equal the listings maintains the RFC to perform skilled work is contrary to federal regulations. The memorandum reiterated SSA's policy that ". . . the sequential evaluation process must continue in the claim with consideration of vocational factors in light of the claimants' residual functional capacity (RFC)."

In addition, in March 1983, SSA issued instructions to the DDSs dealing with mental impairments and their effects on individual work abilities. The instructions say:

> "Where a person's only impairment is mental, is not a listing severity, but does prevent the person from meeting the mental demands of past relevant work, it may also prevent the transferability of acquired work skills. The final consideration is whether the person can be expected to perform unskilled work. The basic mental demands of competitive, remunerative, unskilled work include the abilities (on a sustained basis) to understand, carry out, and remember simple instructions; to respond appropriately to supervision, coworkers, and usual work situations; and to deal with changes in a routine work setting. A substantial loss of ability to meet any of these basic work-related activities would severely limit the potential occupational base.
>
> "Where there is no exertional impairment, unskilled jobs at all levels of exertion constitute the potential occupational base for persons who can meet the mental demands of unskilled work. These jobs ordinarily involve dealing primarily with objects, rather than with data or people, and they generally provide substantial vocational opportunity for persons with solely mental impairments. In a relatively few instances, persons with this large job base will be found disabled because of adversities in age, education, and work experience."

The instructions provided greater flexibility for determining the ability of a mentally disabled person to do

work and may result in more accurate disability decisions. However, the instructions also provide guidance which can be interpreted very restrictively and, if so interpreted, "not disabled" decisions will continue for cases where several mental impairments exist.

Also, earlier this week, SSA issued additional instructions to clarify the RFC criteria for adjudicating mental disabilities. We did not have an opportunity to review these new instructions at the time we were preparing this testimony.

INADEQUATE DEVELOPMENT AND USE OF EXISTING MEDICAL EVIDENCE

The Social Security Act requires that mental impairments causing disability be demonstrated by medically acceptable clinical techniques. When possible, all medical evidence should be obtained from existing sources, including treating physicians and institutions.

Often, treating sources cannot, or do not, provide enough information for the examiners to make a disability decision. The DDS must then purchase the medical evidence in the form of a medical examination, generally referred to as a consultative examination (CE). CEs are needed to

—clarify medical evidence,

—obtain necessary data not otherwise available, or

—resolve conflicts or inconsistencies in the evidence obtained.

In many of the cases we reviewed, the existing medical evidence of record, including evidence already in the case file, had not in our judgment, been appropriately considered. Rather, undue reliance was often given to the CE reports, using them as the primary evidence on which decisions were based.

Examiners we spoke to at the five DDSs visited confirmed this. In our group discussions with examiners, they told

us they order CEs automatically when they receive the case folders. They pointed out that it is almost a waste of time developing thorough longitudinal histories on a person who has some positive characteristics, which they interpret as not meeting the listings. They pointed out to us that if a medical/vocational allowance is warranted they would have to develop the claimant's negative characteristics fully, which is time-consuming, and in the end they feel the case would probably be returned from the DAB because the person would be viewed as being able to do unskilled work. The examiners say they are then penalized on two counts—their backlogs increase and an error is charged against them.

Examiners also said that, because of production and processing time goals to adjudicate cases, they are reluctant to wait for or obtain all the historical data. They said it is much easier and faster to develop and justify a medical/vocational termination with a positive CE report.

Further, examiners said it takes much longer to obtain historical medical evidence for mental impairments than for other body system cases because (1) treating psychiatrists are more reluctant to turn over patients' files; and (2) hospitals and mental health institutions are not timely in providing patient reports, and in both instances time consuming followups are necessary to get the data.

The problems with over-relying on a CE report is that the CE physician rarely has the complete medical history to assess the patient, which can result in the physician relying on the individual's condition at that particular point in time and on the individual's description of his or her history and daily activities. The illness itself may prevent the claimant from accurately portraying such information. Also, if claimants want to appear normal, they may exaggerate their conditions or activities.

For example, we investigated a claim involving a beneficiary with schizophrenia and mental retardation whose benefits were terminated based on a consultative

exam. Two previous CE exams conducted a year and one-half earlier gave the beneficiary a prognosis of "poor" and "nil." The new exam found him to be functioning well. When we visited the beneficiary he was living in a restricted residential facility and participating in a sheltered workshop. He had misrepresented many facts concerning his living arrangements, daily activities, and work capabilities to the Current CE physician. The facility administrator, the floor nurse, the workshop plant manager, and a work evaluation specialist all felt he was incapable of independent living, and of obtaining and keeping competitive employment at any skill level.

Examiners told us that SSA's policy of focusing on daily activities often leads to an over-reliance on CE examinations, which always describe claimant's daily activities. As we said earlier, because of SSA's restrictive interpretations of the medical listings, any positive daily activities that the claimant does are likely to result in a disability denial.

CE reports usually describe the daily activities as he or she "watches television," "visits relatives," "shops," "cooks own meals," etc. Examiners, however, cannot assess the quality of a person's daily functioning and behavior from a simple description of activities.

For example, we investigated a periodic review case involving a schizophrenic who did not meet the listings and was terminated. A CE report based largely on the claimant's statements said he visited friends, played the piano, participated in family activities, and that his schizophrenia was controlled by medication. We talked to the claimant's treating psychiatrists and found (1) medication was an extraordinarily steep dose (100 mg. prolixin decanoate every 2 weeks)—by itself indicating a severe illness—and he still has frequent relapses and (2) daily activities were overstated—friends turned out to be psychiatric social workers and piano playing consisted of aimless doodling.

Scheduling and performing CEs before the historical medical evidence is obtained can also result in unnecessary

costs and detract from the CE physician's ability to accurately assess the severity of the impairment and the quality of the claimant's ability to perform daily functional activities. We believe this is important because, as we will explain next, SSA and State psychiatric resources are severely limited, and yet SSA and the States are not using purchased psychiatric resources to fill this void.

In a discussion with the SSA psychiatrists, they confirmed that it is unlikely that a thorough psychiatric evaluation can be performed on an individual in a CE session without the individual's medical history, prior work history, workshop evaluations, and history of daily activities. These necessary elements are often lacking in CE reports, and do not appear to be developed by the State examiners.

STATE PSYCHIATRIC RESOURCES ARE SEVERELY LIMITED

In the five DDSs, visited, there were no psychiatrists and limited psychiatric training was provided to examiners. Because the process encompasses a medical (psychiatric) evaluation that is highly complex, we asked SSA's psychiatrists whether a lay person or a non-psychiatric physician has the expertise to make such an assessment. They said examiners would not be technically qualified nor would most physicians of other medical specialties.

The chief medical consultant at one DDS said neither he nor the other other staff doctors feel qualified to make a severity or psychiatric review form assessment. At another DDS, the chief medical consultant said the same thing, except he added that a physician specializing in internal medicine might be qualified. The physicians on his staff, however, were not specialists in internal medicine.

Overall, we found that there is a shortage of in-house psychiatric medical staff available for advice within the SSA/State adjudicative system. An SSA study found all six States in the Chicago region were lacking sufficient

psychiatric resources. The States combined had only 50 percent of the minimum number of psychiatric-hours needed for proper case review. Nationally, as of December 1982, four States and the District of Columbia had no in-house psychiatrists/psychologists, and 36 others had, by SSA standards, a deficiency in the minimum psychiatric-hours required.

SSA and State officials said the limited fee rates established by the States are significantly less than a competitive rate and thus, they cannot hire or contract with more psychiatrists or psychologists.

Mr. Chairman, that concludes my statement, and we will be happy to answer any questions you or the Committee members may have.

EXAMPLES OF CASES WHERE GAO'S PSYCHOLOGIST QUESTIONED SSA'S DECISION THAT CLAIMANTS COULD WORK

—A 32-year-old paranoid schizophrenic man with an I.Q. of 88 was on the disability rolls since 1976.The claimant takes psychotropic medication and lives at home with his family, who supervise his daily activities. He has no friends, is isolated, exhibits poor emotional control, and has phobias. He has difficulty comprehending and is incapable of managing his own funds. He works 5 hours one day a week as a janitor's assistant in a church, a charity job. He must be heavily supervised. He attends day treatment three days a week. He previously failed work rehabilitation. His prognosis is listed as poor.

This claimant's benefits were terminated in January 1983, when the DDS concluded that he retained the capacity for simple, repetitive tasks.

—A 31-year-old man with an I.Q. of 68 was on the disability rolls since 1976. The claimant has a history of epilepsy and paranoid and catatonic episodes and was hospitalized in 1960, 1961, and 1980. The claimant lives with his mother and a brother (the mother is the claimant's representative payee) and is in treatment at a mental health clinic. Between 1973 and 1976 the claimant worked intermittently as a dishwasher in a sheltered workshop and hospital, terminating this work because it was too stressful. A psychological exam reported that the claimant exhibited high anxiety, confusion, poor auditory and visual memory, motor area deficits, and decompensated under stress. The mother and brother reported evidence of deterioration, seclusiveness, and inappropriate responses. CE psychiatrists reported the claimant does not appear capable of coping with even minimal stress. Claimant's judgment is evaluated as poor.

This claimant's benefits were terminated in October 1982 because the DDS concluded that the claimant had the RFC to understand, carry out, and remember instructions; to respond appropriately to supervision, coworkers, and customary work pressures in a routine work setting; and to do unskilled work.

—A 30-year-old acute schizophrenic man with borderline mental retardation held several jobs as a gas station attendant prior to 1976, when he was adjudged incompetent to manage himself or his money and began receiving disability benefits. Institutionalized in 1978 and 1982, he has been in treatment since August 1982 at a mental health center. Treating psychiatrists have evaluated the claimant as restless, depressed, self-preoccupied, distractible, quarrelsome, ruminative, and disruptive. A psychological exam showed that the claimant was suspicious, paranoid, depressed, and unable to function under pressure. A CE report said the claimant "may not be able to do repetitive tasks. May not be able to understand stress and pressures associated with day-to-day activity. Probably not able to manage own funds."

This claimant's benefits were terminated in October 1982 because the DDS concluded that the claimant had the RFC to understand, carry out, and remember instructions; to respond appropriately to supervision, coworkers, and

customary work pressures in a routine work setting; and to perform unskilled work.

—A 33-year old chronic paranoid schizophrenic man, who in the past worked intermittently at unskilled jobs. The claimant was hospitalized in 1973, 1974, 1978, 1979, 1980, 1981, and in April 1982. His disability payments began in June 1978 and he has a representative payee. Reexamined in June 1981, he met the listings and his benefits were continued. The claimant was again reexamined in July and August 1982. An August 1982 psychiatrist's report says of the claimant: "Client's paranoid and persecutory thinking would probably make it very difficult for him to tolerate the pressures associated with achieving production requirements. His ability to retain concentration long enough to perform tasks is also questionable. Hostility towards authority figures would probably cause him to have great difficulty carrying out instructions given by the supervisor. Medication, primarily phenothizines and antipsychotics, appears to help the claimant in controlling aggressive impulses and staying in touch with reality. Long-term chemotherapy, supportive psychotherapy, and hospitalization during crisis will be needed to maintain the client in the community."

This claimant's benefits were terminated in September 1982 because the DDS concluded that the claimant was able to care for himself, relate adequately to others, and understand and carry out instructions. He was determined to be able to do unskilled work.

—A 53-year-old mildly retarded schizophrenic man whose benefits began in September 1975, had them continued after reexaminations in 1977 and 1978. The claimant was hospitalized in 1975, 1976, and twice in 1977. The claimant has advanced Tardive Dyskinesia, cannot sleep at night, and lives in supervised nursing home. The attending physician stated the claimant is unable to read or write, has anorexia, poor judgment, no insight, and limited comprehension. He fears that people plot against him and has

no contacts outside of the nursing home. The claimant needs help in managing money. The CE report considered the claimant to be oriented to time and place and found that he spoke relevantly and coherently.

This claimant's benefits were terminated in November 1982 because the DDS concluded that the claimant was well oriented to time, place, and person; was able to understand, remember, and carry out simple one- or two-step job instructions; and could do unskilled work.

—A 30-year-old paranoid schizophrenic man was in a partial hospitalization program and functioning at a basic level on medication, according to two psychiatric evaluations. The claimant, who has been on the rolls since January 1975, has a diminished effect, cannot manage his own funds (his mother in his representative payee), is withdrawn, has no interests, and exhibits poor thought process, insight, and judgment. He decompensates under stress.

This claimant's benefits were terminated in June 1982 because the DDS concluded that he could do relevant past work.

—A 56-year-old registered nurse was diagnosed as depressed with paranoid features, complicated by alcoholism and possibly early Alzheimer's disease. She was institutionalized in 1967, 1970, 1979, and July 1982. The claimant worked as a registererd nurse for 29 years until 1977. She was allowed disability in April 1978. A CE physician in 1978 felt the disability was sufficient not to establish a medical diary date. In 1980 the claimant was placed in Goodwill Industries as a nurse's aid. She had a breakdown in October 1981 and has been living in a nursing home. Though active and social and offering a normal appearance, the claimant functions under supervision with constant reminders. The nursing home is her representative payee. The claiment needs help dressing and taking medicine. She needs to be reminded to eat. She has a hobby and goes to yard sales with encouragement. Her

treating physician and nursing home personnel say she is deteriorating and cannot function except in a structured supervised environment. When the claimant lived alone, she neglected her home, became depressed, and did not eat and did not keep herself clean.

Disability benefits were terminated in October 1982 on the basis that she is oriented in 3 spheres, has a satisfactory memory, has good contact with reality, is neat and clean in appearance, and functions adequately in daily activities.

SSA-2506 Psychiatric Review Reference SI 2211 DI 9702 (cont.)

GED — MEDICAL CONSULTANT STAFF - PSYCHIATRIC REVIEW

Applicant's Name

Review Status
Initial - 1
Return - 2

Social Security Number

Card Code "P" P

S.A. CODE

A. EFFECTIVE INTELLIGENCE:

1. Verbal (Comprehension, reasoning ability, etc.)
2. Manual (Aptitude for skilled labor)
3. Organicity (Impairment of functioning)

Overall Degree of Impairment in this Area

B. AFFECTIVE STATUS:

1. Anxiety Tension (Overt only, do not infer)
2. Depression (Overt only, do not infer)
3. Phobia (s) (do not infer)
4. Psychophysiological Disturbance (s)
5. Conversion Symptomatology
6. Suicidal Homicidal Thought or Behavior

Overall Degree of Impairment in this Area:

C. REALITY CONTACT:

1. Delusions
2. Hallucinations
3. Paranoid Tendencies
4. Confusion (non-organic)
5. Hyperactivity Excitement
6. Mood Swings, Emotional Lability
7. Emotional Withdrawal Seclusiveness
8. Bizarre, Unusual Behavior

Overall Degree of Impairment in this Area

D. TOTAL PSYCHIATRIC IMPAIRMENT RATING

MED-CA. CONSULTANT SIGNATURE DATE APPLICATION NUMBER

Form SSA-2506-U4 (8-81)
Prior editions may be used until supply is exhausted

GPO : GED LOCKING YELLOW : DCPS
PINK : DDS GOLD : OCS

311

U.S. GOVERNMENT PRINTING OFFICE 1982—381-156/84

PLAINTIFF'S EXHIBIT 6

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE
REGION II
FEDERAL BUILDING
26 FEDERAL PLAZA
NEW YORK, NEW YORK 10047

November 09, 1978 Social Security Administration

Harry R. Pace M.D.
Chief Medical Consultant
Disability Determinations
Department of Social Services
New York, New York 10007

Dear Dr. Pace:

Prior to your joining the medical staff of the New York State Agency we here in the CRS received in August an excellent summary letter and sample cases from Dr. Oliva and Mr. Lachman dealing with second and third tier review procedures in psychiatric cases. I enlisted the aid of one of our program analysts and of our most experienced psychiatrist and the entire matter was scrutinized. As a result, it became apparent that the two levels of review were in some cases using different measures to gauge disability and that a meeting of the minds was needed to resolve the issues. Such a meeting was held on October 26, 1978 with the entire CRS neuro-psychiatric staff and 3 members of CO's staff present and I shall try to summarize the conclusions reached from the material at hand.

After receipt of your August letter, I reviewed the material and then asked Camille Maher to do the same and give her analysis of the problem. The following memorandum resulted and I have enclosed a copy of same for your review and usage since this formed the basis for Dr. Schneidmuhl's (from CO) responses which I have also enclosed (I took the liberty of numbering the parts of the Maher memo to correspond with the Schneidmuhl responses). Dr. Anne Geller of CRS also reviewed all of the material and page 2 of her reply is enclosed since it deals in large matter with the questions that were raised.

After the meeting, all seemed generally agreed that Tier II and Tier III were adjudicating cases somewhat differently and that henceforth a concerted effort would be made to see that this no longer occurred. The emphasis will now be placed on objective findings in the patients and the current status as opposed to the longitudinal history in reaching a decision as to the presence or absence of disability. We have always tried to avoid returning cases where policy is unclear and will continue to do so. You can appreciate that in a large organization such things can and do occasionally occur and for this we apologize. We also want you to known that we appreciate your undertaking so major an effort to correct ongoing problems and we hope that our efffort in response will serve to clarify and settle the issues raised.

If any problems remain in this regard, please let me know and I will try to help solve them.

Sincerely yours,

MARVIN BIERENBAUM M.D.
Regional Medical Advisor

JAMES FROEHLICH
Chief

Case Review Section
Enclosure
MB:es

UNITED STATES GOVERNMENT

MEMORANDUM

DATE: August 24, 1978
REPLY TO
ATTN OF: Neuro Psychiatrist
Disability Insurance, NY CRS
Subject: Review of Psychiatric Cases
TO: Regional Medical Advisor
Disability Insurance, NY CRS

I am not sure what you want me to do but I will give you a case analysis and make some suggestions.

Cases 1. M: R 35
2. A: R 41
3. E: R 39

These claimants do not meet the Listings. It is also very clear that they cannot work; however their ages preclude any age/vocational considerations. TTR reviews on which one has to base ones decisions do not have any place in which a longitudinal pattern can be assessed. The psychiatric QED deals only with current symptomatology. It is clear that whether the claimant can withstand the stress of competitive work or not is never a consideration. Unfortunately, these are the guidelines we have to follow even though common sense and psychiatric expertise dictate otherwise. We cannot therefore return cases such these [sic], reversing a decision which unquestionably TTR would agree with.

4. W H

Unquestionably we are wrong. Further evidence as suggested by La Raca (who is he?) is essential.

5. K E

This case is less clear and a denial as proposed by SA is ridiculous. Again to request an expanded mental status evalution would have been more reasonable than revising the decision on the evidence provided.

6. E G

Does not meet listings. Agree with SA we should not have returned case.

7. L. I

An example of TTR thinking. Although Schneidmahill mentions additional documentation, in fact, his severity rating gives a good idea of the manner in which such cases are assessed.

Page 2 – Review of Psychiatric Cases

8. R A

Here the TTR consultant has misread the reports since no improvement has been documented and a duration denial is inappropriate. Requesting additional MS information would have been reasonable.

Conclusions

1) We are certainly giving SA a conflicting message since there is no question that we are in disagreement with TTR assessments of severity. Although the two cases 7, 8 are not clear examples of their policy, nonetheless, based on previous returns, case #7 is a fair example of their ratings.
2) We have to do some more training based on TTR returns otherwise we will continue to be in this bind.
3) This is not to say that TTR returns cannot be argued as in case 8 but that we cannot ignore their basic policies.

I suppose this isn't very helpful; essentially I would agree with Camille's analysis in answer to the questions.

1) From the sessions at Baltimore and my understanding of equivalency, this is rare and would occur mainly with 12.04 (deterioration of personal habits) which may not occur in obsessive compulsions or phobics whose condition may nonetheless be otherwise incapacitating but otherwise these are no substitutions for the history prerequisites.
2) The listings require a marked impairment. This is usually taken to be little beyond the barest minimum needed to survive outside an institution. I would be interested in CO response to this question but haven't seen one.

3) Unless it is a reasonable procedure to request a workshop evaluation on these cases which do not meet the listings, are moderately severe and ability to withstand stress of competitive work situation is questioned, their medical-vocational allowances would be confined to older workers with adverse vocational background. In fact TTR's returns have never requested such evaluation and have specifically denied cases on grounds of not meeting listings when such an evaluation might have been appropriate. I therefore conclude that in younger workers medical-vocational allowances are not considered when the impairment is psychiatric.

ANNE GELLER, M.D.

AG:es

PLAINTIFFS' EXHIBIT 12

MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

TO:	Division of Preadjudicative Policy
DATE:	March 19, 1980
REFER TO:	SJH-2
FROM:	Medical Consultant Staff
SUBJECT:	Psychiatric Impairments and RFC (New York – INFORMATION RO Memo 2-26-80)

The New York Regional Office has asked guidance as to what abnormalities on the mental status examination would indicate inablility to sustain which basic elements of unskilled work. "Unskilled work is defined as work which requires little or no judgment in performance of simple duties which can be learned on the job in a short period of time" (Informational Digest No. 79-29). How to translate information from the mental status findings and use it to determine ability or inability to sustain unskilled work is not an overly difficult task.

The Guide for Use of the Psychiatric Review Form (PRF; official designation Form: SSA-2506-U4) facilitates the uniform and reliable application of the disability guides contained in the psychiatric portion of the Listing of Impairments. It is intended as a means whereby the reviewing psychiatrist, after a thorough review of all relevant information in an applicant's file, can systematically record his conclusions regarding the presence and intensity of a variety of signs, symptoms, and behaviors.

These separate conclusions are subsequently combined to yield the required judgment as to overall degree of impairment in each of three major areas of functioning: Efffective Intelligence, Affective Status, and Reality Contact. The ratings in all major areas of functioning on the PRF refer to the applicant's status from the time relevant to the alleged onset of disability through the date of the last medical evidence. Each item is to be rated for presence and severity according to the following five-point scale:

Rating: 1 Normal – no problem in this area
2 Slight degree – definitely not disabling
3 Moderate degree
4 Moderately severe degree
5 Severe – disabling degree (Listings met or equaled)

The findings of the mental status examination can be translated into a numerical scale that gives an idea as to the claimant's level of impairment as well as his ability to perform unskilled work. For instance, can a person understand and follow simple directions, and perform simple tasks without supervision? The lower (more normal) the rating in the area of Effective Intelligence, the better equipped the claimant is to understand, to follow directions, and to perform tasks of varying complexity. Next, can a claimant respond appropriately to supervision, to coworkers, and to customary work pressures? This can be deduced from the ratings made in the Affective Status and Reality Contact areas. An individual who scores more than "2" in any of these areas would certainly be more limited in his capacity to respond appropriately to supervision, coworkers, and customary work pressures than would a person with a score of "1" or "2."

Psychiatrists as physicians are expected to have some expertise in recognizing psychopathology and in rendering a prognosis. Thus, their reports might include opinions on such matters as the ability to cope with stress and the ability to relate to other people and to function in a group situation. The DDS psychiatrist should be able to extract such information from the reports, and if adequately trained in the PRF, he should be able to translate such information into PRF ratings with their corresponding implications for ability to engage in unskilled work.

With respect to item 3, the question is raised as to what weight to give findings such as poor visual-motor coordination, limited attention span, etc., that may have been used in the IQ assessment. As before, these aspects should be taken into consideration in making the PRF ratings in the Effective Intelligence area. However, it would be clearly inappropriate to use these same deficiencies in assessing RFC.

If all of the above seems somewhat confusing, it is basically because the wrong question is being asked. Residual functional capacity is not a separate factor – it is merely what remains (RFC) after the severity of impairment is subtracted from normal functional status. In the Mental Disorders, at least, a Total Psychiatric Impairment rating of less than "5" signifies the ability to engage in SGA at the level of unskilled work or higher. Where it does not mean precisely that, the PRF is being improperly used. Thus, where the PRF is properly employed, a separate RFC rating would be redundant and tantamount to giving double weight to the same case aspects.

Acting Chief Consultant in
Psychiatry and Neurology

PLAINTIFFS' EXHIBIT 15

Meeting of Chief Medical Consultants
7/24/80

Present

Dr. Bierenbaum, RO
Dr. Wolf, RO
Dr. Ramirez Santoni, PR
Dr. Wilkerson, NJ
Dr. Pace, NY
Dr. Oliva, NY
Dr. Shapiro, NY

Seminar in Central Office

All Chief Regional Medical Advisors met in CO during the week of July 14. RO's were permitted to bring a DDS physician but because of the short notice and budget constrictions, only about half of the regions were able to arrange this.

Rhoda Greenberg, Director of Office of Disability Programs, advised of several upcoming items:

1. Pre-effectuation review of claims will be instituted in October. The particulars of how and where this will be done are still being considered. In the first year, 15% of cases will be receiving this type of review.
2. SSA is extremely dissatisfied with ALJ decisions. They are working on a procedure for review of their decisions beginning with the next fiscal year. The particulars of who will perform this review are not arranged at this time.

3. A new procedure for processing reconsiderations is being instituted. A pilot study will be done with 8000 cases nationally. The procedure will require:
   - a phone call to the attending physician as a first action to update the evidence.
   - development of all medical evidence of record.
   - purchase of a CE if none was purchased at the initial level.
   - purchase of a CE for any other organ system involved where such CE was not purchased at the initial level.
   - the DDS review physician will provide an RFC assessment in great detail; a form will be prepared for this purpose.
   - the examiner will prepare a detailed statement as to the reason for the denial at the recon level; medical terms will be included so that attending physicians and/or lawyers will be able to see the basis for the denial.

4. Any hearings case where the claimant admits new evidence will be remanded to the DDS. This is in response to the increased number of instances where lawyers submit such evidence late in the claims process.

OPEC Study

The Seattle region did a pilot study of claimants currently on the beneficiary rolls. The study showed that a significant percentage should not be receiving benefits. The reasons were varied, such as diaried cases not sent for CDI by ODO or your initial level documentation or incorrect initial level decision. The study was extended nationwide and of 4000 study cases, 400 were in the NY region. This subsequent review confirmed the initial study findings. A preliminary report was issued. They will conduct the study again at the end of this year, using a greater number of cases.

Vocational Factors in Mental Impairment Claims

The R/O memo to C/O requesting clarification of this area was reviewed as was C/O's (Dr. Puig) response. The conflicting stance between C/O medical staff and policy staff was described. Dr Puig's memo supports the NY DDS position while DAB physicians had been following the policy staff position. DAB physicians will now follow the position described by the Dr. Puig memo.

In the near future, all DDS's and R/O's nationally will be mandated to use the Psychiatric Review Form. Until such time as its use is mandated, Dr. B encourages DDS use of the form. DAB has already begun to use it. DDS MD's may need training on completion of the form. Also, they should be discouraged from using their clinical experience to estimate impairment severity when, in fact, the case is inadequately documented with mental status exam findings and should be rated an 07.

Regionally-Prepared RFC Guide

Further discussion of this guide was deferred pending DDS review of the C/O prepared guide distributed by Dr. B. A subcommittee was designated to meet at the beginning of October, when Stephanie Blaskovich (vocational consultant) returns to duty. The subcommittee will be: Dr. [Illegible], Dr. Oliva, Dr. Wilkerson, and Stephanie or Camille Maher. Meetings of the subcommittee will be scheduled for Thursday afternoons.

RFC Guide Prepared by C/O

Full discussion of this guide was also deferred pending DDS review of the material. The cardiovascular sections were reviewed with no complaints as to the contents.

PLAINTIFFS' EXHIBIT 23

[Illegible]

DEPARTMENT OF HEALTH & HUMAN SERVICES

Refer to: SJH-41 Memorandum
Your Reference: SD2B4 DI-9
Date Nov 12 1982

From Associate Commissioner for Operational Policy and Procedures

Subject Suggested Revisions to Guidelines for Evaluation of Mental Impairments
(Your Memo, 7/19/82)—INFORMATION

To Regional Commissioner
New York

This is in response to the questions and suggestions by the New York Disability Determination Services (DDS). We purposely delayed our response until after our discussion of psychiatric evaluation issues with a Blue Ribbon Committee of Psychiatrists which was scheduled to meet with central office staff in September. We wanted our responses to reflect this group's consideration of the issues raised by the New York DDS. Additionally, we discussed this request and the broad issue of the evaluation of mental disorders in our meeting with your staff in New York on September 24, 1982. Further, our activities in improving guidelines for mental disorders will be covered in our meeting with assistant regional commissioners and branch chiefs on November 16-17. As you can see from the list at tab B, there are 11 major activities underway. Please be assured that the points you have raised are being considered in the development of these items. Specific responses to your points are at tab C.

Your continued interest and input in this complex area are appreciated. If your staff have questions, they should contact Ray Easley, Division of Preadjudicative Policy, on FTS 987-1585.

Sandy Crank

Attachments:
Tab A – Your Memo, 7/19/82
Tab B – Evaluation of Mental Impairments – Activities Underway
Tab C – Responses to DDS Questions and Suggestions

[TAB A]

July 19, 1982

File Code: D15-4
Refer To: SD2B4

Regional Commissioner
New York

Suggested Revisions to Guidelines for Evaluation of Mental Impairments – ACTION

Associate Commissioner for
Operational Policy and Procedures
For Office of Disability Programs

As a result of the Periodic Review of CDI's there has been considerable adverse publicity about the cessation of mental impairment claims, both nationally and in this region. Some recent OA case returns were inconsistent with both previous policy memos and case reviews and raised a question as to the correct adjudicative policy for mental impairment cases. The DDS is currently rebutting many of these cases. However, as a result of the OA returns, the DDS has asked for definitive written guidance in this area. Enclosed in their letter with an attachment providing suggested re-wording for Listing 12.00 paragraph 2 and POMS DI 2382.1c.

We are aware that other regions have made similar requests for guidance so this appears to be an issue of national concern. We also note that several recent initiatives (e.g. POMS IRD's, workgroups) indicate Central Office is also aware of the need for additional guidelines in this area. The New York DDS's questions and suggestions are, therefore, extremely timely and important.

With regard to the DDS's three questions, we feel that the answers to these are contained in current publications, although expansion on the published material might be

useful. Perhaps a national program circular could be issued reiterating the policy which is currently located in several different areas.

Our DAB physicians have reviewed the material and find it to be acceptable. We would also appreciate C/O comments on the suggested revisions. We would like to have specific statements as to whether or not *each item* is acceptable and an explanation of why it would or would not be appropriate. You may wish to share this material with the various workgroups who are currently discussing this issue.

PETER P. DISTUREO

Attachment

[TAB B]

Evaluation of Mental Impairments

Activities Underway

- Issue additional guidelines on how to evaluate psychiatric symptoms. (POMS DI 2205.1)
- Provide more definitive guides on the evaluation of mental disorders. (POMS DI 2211)
- Provide more definitive guides on the evaluation of residual functional capacity (RFC) for mental impairments. (POMS DI 2212)
- Issue additional guidelines on how to evaluate long-term chronic mental impairments. (POMS DI 2213)
- Issue additional guidelines regarding use of the psychiatric review form (PRF) which may lead to a finding of medical equivalence in evaluating mental disorders. (POMS DI 2211)
- Issue guidelines on how to identify mental requirements of jobs.
- Improve guidelines on how to evaluate nonexertional and combined exertional and nonexertional impairments. (POMS DI 2388.1-2388.4)
- Analyze the effectiveness of workshop evaluations in claims involving mental impairments.
- Improve the content of the consultative examination (CE) report for psychiatric disorders. (POMS DI 2027.1)
- Update the Listing of Impairments criteria for mental impairments.
- Issue guidelines on how to handle cases involving potential suicide or homicide.

[TAB C]

Response to DDS Questions and Suggestions

1. Q. When does a psychiatric impairment meet the listings?

A. It is difficult to answer so broad a question except to say that a psychiatric impairment meets the listings when the specific medical findings describing the impairment match the severity and duration of a set of findings in the Listing of Impairments. We can appreciate that the basis for the question may be a problem in understanding the application of the part B (12.02, 12.03, 12.04) functional restrictions. We are in the process of providing supplemental guidance on this issue in POMS DI 2213 which should be released for publication in January 1983. These additional instructions should further clarify the intent and application of part B.

2. Q. When (if ever) can a psychiatric claim be allowed as "equaling" the listings?

A. An impairment, including a mental impairment, can be found to equal the listings if it meets the requirements stated in Regulation 404.1526 and POMS DI 2103. The determination of medical equivalence is uncommon, or rare, in cases involving only a mental impairment because of broad categorization of mental impairments under Listing 12.02-12.05; however, this may occur. The circumstance is most easily explained by referring to the area ratings on the psychiatric review form. For example, medical equivalence will usually be considered if the rating under effective intelligence is 3 and the rating of either affective status or reality contact, or a combination of the two, is 4. This would result in a total rating of 5, bu: it may not be possible to identify a single listing as being met.

3. Q. When can a psychiatric claim be allowed on a medical/vocational basis due to restricted RFC, despite the absence of adverse vocational factors?

A. Never. There must be adverse vocational factors in order to support a medical/vocational allowance. The degree of adversity required, however, is determined in conjunction with the residual functional capacity (RFC), and all three vocational factors need not be adverse to warrant an allowance when the RFC is markedly reduced.

DDS Suggestions on Section 12.00A of the Listing of Impairments

1. (Marked Restriction of Daily Activities)

DDS Suggestion:

Limitation of activities to those necessary for maintaing life at a very basic level will not be inconsistent with listing-level severity. Thus, a claimant whose activities consist only of keeping himself/herself sheltered, fed and clothed, as well as obtaining medical treatment, may still meet the listings if the requirements of part A of the above listings are met.

However, once a claimant engages in activities which are similar to those required for "normal" working and living, the listing would not be met. Examples of these activities would include:

a. Regular independent travel.

b. Engaging in hobbies.

c. Participating in social and/or community activities.

d. Regular reading, listening to radio, watching television and movies.

Response:

The recommendation is made that "a claimant whose activities consist only of keeping himself/herself sheltered, fed, and clothed, as well as obtaining medical treatment, may still meet the listings if the requirements of part A of the above listings are met." While this may be essentially true, we believe this is too general and we find it difficult

to rephrase it in a manner that it can be generally applied. For example, an individual who would not meet the listings may still have to devote all of his/her activities to obtaining shelter, food, clothing, and medical care. The part B restrictions are required to provide the necessary definition to the impairment severity. Moreover, many people do not engage in hobbies or participate in social and/or community activities. The absence of such activities would not be determinative. If they were present, the quality and meaning would have to be considered.

2. (Constriction of Interests)

DDS Suggestion:

Total involvement in one's self with concern only for the stability of one's mental conditon, would be consistent with the kind of restriction of interests contemplated in the listings.

Response:

An individual may be extremely self-centered and concerned with his/her mental condition and not have an impairment which meets or equals the listings or is disabling.

3. (Deterioration of Personal Habits)

DDS Suggestion:

Evidence of the above is not required to meet Listing 12.03 (functional psychotic disorders). A neat appearance at a consultative examination would not, by itself, be evidence that a claimant does not meet a listing. The claimant's family may be responsible for what is actually an atypical appearance.

Response:

An individual's neat appearance, particularly at a consultative examination, would not necessarily be considered to conflict with fulfilling this requirement in Listings 12.02 and 12.04. The independence of the activity would have to be evaluated. A future POMS section will include a statement to emphasize the necessity of considering the independence and quality of activities.

4. (Seriously Impaired Ability to Relate to Other People)

DDS Suggestion:

Maintaining relationships with preexisting family and/or treating sources would not be inconsistent with listing-level severity. However, the following would be evidence that the claimant's ability to relate to others is not seriously impaired:

a. Seeking and establishing friendships.

b. Regular visits to others.

c. Engaging in voluntary work in the community.

Note: Where objective evidence establishes that the claimant's impairment causes relationships to be abnormal, e.g., the paranoid person who relates to others but then "acts out" delusions, it would not be appropriate to say that the claimant can relate to others.

Whenever data to document the above criteria are in conflict or not available from the records of claimant's treating sources, a psychiatric social survey, performed at claimant's home and including evidence from family and neighbors, should be obtained.

Response:

There are many situations in which individuals who are not severely impaired restrict their contacts to preexisting relationships with family and friends. The note that it would not be appropriate to find that an individual can relate to others if objective evidence establishes the relationships are abnormal, e.g., "the paranoid person who relates to others but then 'acts out delusions,' " needs elaboration. What is the manner of the relationships? What are the delusions? In what way is there acting out?

Although additional information should be obtained to resolve conflicting information, if that information is not available from the treating sources' records, we are unable at this time to determine whether the best source of this information is a psychiatric social survey. As more informa-

tion on the use and effectiveness of a psychiatric social survey is obtained, we will evaluate this approach to determine whether this source of information will provide the kind of evidence needed to resolve the impairment severity issue in such claims.

Suggestion on Revision of POMS 2387.1.c, Assessment of Residual Functional Capacity

DDS Suggestion:

A finding that a claimant cannot perform the mental functions of unskilled work will be made when, based upon all of the relevant evidence in the file, the DDS staff physician in performance of his responsibility under POMS 2382.1B decides the claimant cannot perform one or more of these functions. (The DDS then listed some examples in which such a finding would be appropriate.)

Response:

While we agree that it would be appropriate to consider such information as that shown in the examples, we believe the basis for a decision that a claimant cannot perform the mental functions of unskilled work activity should be based on a comprehensive assessment of the individual's impairment. Undue emphasis should not be placed on either a single positive or negative finding. Instead, a broad range of findings concerning the claimant's mental illness over a representative period of time must be considered and any statement, such as "acting out delusions", must be explained. POMS DI 2213 – Evaluation of Chronic Mental Impairments – to be published in January 1983, emphasizes the importance of obtaining such evidence to permit a longitudinal approach to the evaluation of menal disorders.

PLAINTIFFS' EXHIBIT 60

DISPOSITION OF RANDOM SAMPLE OF INITIAL CLAIMS FOR DISABILITY ON ALL FUNCTIONAL MENTAL IMPAIRMENTS (Appendix 12.03 and 12.04)

by New York Office of Disability Determinations

All Applicants

	1979	1980	1981	1982	1983
1. Number of Claims allowed	53	51	38	23	47
2. Number of Claims denied	343	449	347	526	324
3. Percent of Claims allowed	12.4	10.2	9.9	4.2	12.7
4. Number of decisions on medical/vocational grounds	37	64	108	175	144
5. Number of Claims allowed on medical/vocational grounds	4	3	4	3	28
6. Percent of Claims allowed of cases decided on medical/vocational grounds	10.8	4.7	3.7	1.7	19.4
7. Percent of cases allowed on medical/vocational grounds of all applications	1.0	0.6	1.0	0.5	7.5
8. Percent of all *allowances* which represent medical/vocational allowances	7.5	5.9	10.5	13.0	60.0

Source: Computer printouts of Tier II Disability Insurance Quality Reviews (QA)

DISPOSITION OF RANDOM SAMPLE OF INITIAL CLAIMS FOR DISABILITY ON ALL FUNCTIONAL MENTAL IMPAIRMENTS
(Appendix 12.03 and 12.04)

by New York Office of Disability Determinations

Applicants Age 0-49

	1978	1979	1980	1981	1982	1983
1. Number of Claims allowed	Not	Not	23	23	18	35
2. Number of Claims denied	Avail-	Avail-	165	279	430	268
3. Percent of Claims allowed	able	able	12.2	7.6	4.0	11.6
4. Number of decisions on medical/vocational grounds			21	81	133	117
5. Number of Claims allowed on medical/vocational grounds			0	1	0	21
6. Percent of Claims allowed of cases decided on medical/vocational grounds			0.0	1.2	0.0	17.9
7. Percent of cases allowed on medical/vocational grounds of all applications			0.0	0.3	0.0	6.9
8. Percent of all *allowances* which represent medical/vocational allowances			0.0	4.3	0.0	60.0

Source: Computer printouts of Tier II Disability Insurance Quality Reviews (QA)

DISPOSITION OF RANDOM SAMPLE OF RECONSIDERATIONS OF CLAIMS FOR DISABILITY ON ALL FUNCTIONAL MENTAL IMPAIRMENTS

(Appendix 12.03 and 12.04)

by New York Office of Disability Determinations

All Applicants

	1979	1980	1981	1982	1983
1. Number of Claims allowed	104	57	1	9	15
2. Number of Claims denied	753	619	39	143	84
3. Percent of Claims allowed	12.1	8.4	2.5	5.9	15.2
4. Number of decisions on medical/vocational grounds	180	132	18	66	47
5. Number of Claims allowed on medical/vocational grounds	9	6	0	1	10
6. Percent of Claims allowed of cases decided on medical/vocational grounds	5.0	4.5	0.0	1.5	21.3
7. Percent of cases allowed on medical/vocational grounds of all applications	1.1	0.9	0.0	0.7	10.1
8. Percent of all *allowances* which represent medical/vocational allowances	8.7	10.5	0.0	11.1	66.7

Source: Computer printouts of Tier II Disability Insurance Quality Reviews (QA)

DISPOSITION OF RANDOM SAMPLE OF RECONSIDERATIONS OF CLAIMS FOR DISABILITY ON ALL FUNCTIONAL MENTAL IMPAIRMENTS (Appendix 12.03 and 12.04)

by New York Office of Disability Determinations

Applicants Age 0-49

	1978	1979	1980	1981	1982	1983
1. Number of Claims allowed	Not	Not	12	1	6	11
2. Number of Claims denied	Avail-	Avail-	141	31	121	72
3. Percent of Claims allowed	able	able	7.8	3.1	4.7	13.3
4. Number of decisions on medical/vocational grounds			36	13	55	41
5. Number of Claims allowed on medical/vocational grounds			0	0	1	7
6. Percent of Claims allowed of cases decided on medical/vocational grounds			0.0	0.0	1.8	17.1
7. Percent of cases allowed on medical/vocational grounds of all applications			0.0	0.0	0.8	8.4
8. Percent of all *allowances* which represents medical/vocational allowances			0.0	0.0	16.7	63.6

Source: Computer printouts of Tier II Disability Insurance Quality Reviews (QA)

DISPOSITION OF RANDOM SAMPLE OF INITIAL CLAIMS FOR DISABILITY ON ALL FUNCTIONAL MENTAL IMPAIRMENTS (Appendix 12.03 and 12.04)

by New York Office of Disability Determinations

All Applicants

	1st Quarter 1983	2nd Quarter 1983	3rd Quarter 1983
1. Number of Claims allowed	7	12	28
2. Number of Claims denied	136	148	40
3. Percent of Claims allowed	4.9	7.5	20-30%
4. Number of decisions on medical/vocational grounds	50	64	30
5. Number of Claims allowed on medical/vocational grounds	1	7	20
6. Percent of Claims allowed of cases decided on medical/vocational grounds	2.0	10.9	66.7
7. Percent of cases allowed on medical/vocational grounds of all applications	0.7	4.4	
8. Percent of all *allowances* which represent medical/vocational allowances	14.3	58.3	71.4

Source: Computer printouts of Tier II Disability Insurance Quality Reviews (QA)

DISPOSITION OF RANDOM SAMPLE OF INITIAL CLAIMS FOR DISABILITY ON ALL FUNCTIONAL MENTAL IMPAIRMENTS (Appendix 12.03 and 12.04)

by New York Office of Disability Determinations

Applicants Age 0-49

	1st Quarter 1983	2nd Quarter 1983	3rd Quarter 1983
1. Number of Claims allowed	5	6	24
2. Number of Claims denied	116	121	31
3. Percent of Claims allowed	4.1	4.7	43.6
4. Number of decisions on medical/vocational grounds	42	50	25
5. Number of Claims allowed on medical/vocational grounds	1	3	17
6. Percent of Claims allowed of cases decided on medical/vocational grounds	2.4	6.0	68.0
7. Percent of cases allowed on medical/vocational grounds of all applications	0.8	2.4	30.9
8. Percent of all *allowances* which represent medical/vocational allowances	20.0	50.0	70.1

Source: Computer printouts of Tier II Disability Insurance Quality Reviews (QA)

DISPOSITION OF RANDOM SAMPLE OF RECONSIDERATIONS OF CLAIMS FOR DISABILITY ON ALL FUNCTIONAL MENTAL IMPAIRMENTS (Appendix 12.03 and 12.04)

by New York Office of Disability Determinations

All Applicants

	1st Quarter 1983	2nd Quarter 1983	3rd Quarter 1983
1. Number of Claims allowed	3	2	10
2. Number of Claims denied	35	33	16
3. Percent of Claims allowed	7.9	5.7	38.5
4. Number of decisions on medical/vocational grounds	16	17	14
5. Number of Claims allowed on medical/vocational grounds	0	2	8
6. Percent of Claims allowed of cases decided on medical/vocational grounds	0.0	11.8	57.1
7. Percent of cases allowed on medical/vocational grounds of all applications	0.0	5.7	30.8
8. Percent of all *allowances* which represent medical/vocational allowances	2.0	100.0	80.0

Source: Computer printouts of Tier II Disability Insurance Quality Reviews (QA)

DISPOSITION OF RANDOM SAMPLE OF RECONSIDERATIONS OF CLAIMS FOR DISABILITY ON ALL FUNCTIONAL MENTAL IMPAIRMENTS (Appendix 12.03 and 12.04)

Applicants Age 0-49

	1st Quarter 1983	2nd Quarter 1983	3rd Quarter 1983
1. Number of Claims allowed	2	2	7
2. Number of Claims denied	33	27	12
3. Percent of Claims allowed	5.7	6.9	36.8
4. Number of decisions on medical/vocational grounds	16	16	9
5. Number of Claims allowed on medical/vocational grounds	0	2	5
6. Percent of Claims allowed of cases decided on medical/vocational grounds	0.0	12.5	55.6
7. Percent of cases allowed on medical/vocational grounds of all applications	0.0	6.9	26.3
8. Percent of all *allowances* which represent medical/vocational allowances	0.0	100.0	71.4

Source: Computer printouts of Tier II Disability Insurance Quality Reviews (QA)

PLAINTIFFS' EXHIBIT 61

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. CV-83-0457

THE CITY OF NEW YORK, et al, Plaintiffs

v.

SECRETARY OF HEALTH AND HUMAN SERVICES, et al,

Defendants

The deposition of DR. JOSE G. PUIG was taken on Thursday, May 12, 1983, commencing at 10:30 a.m. at the Social Security Administration, Security Boulevard, Woodlawn, Maryland, before Robert Shocket, a Notary Public.

APPEARANCES:

Leonard S. Rubenstein, Esq., of counsel

Ruben Koolyk, Esq., United States Attorney, Eastern District of New York

Gabriel L. Imperato, Esq., on behalf of the Social Security Administration

Thomas Bergdal, Esq., on behalf of Plaintiff City of New York

Howard L. Zwickel, Esq., on behalf of Plaintiff State of New York

Jan G. Zager, Esq., on behalf of Class Plaintiffs

Gail N. Mancher, Esq., on behalf of Office of General Counsel

Reported by: Robert Shocket

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STIPULATIONS

It is stipulated and agreed that the filing of this deposition with the Clerk of the Court be and the same is hereby waived.

* * * * * *

DR. JOSE G. PUIG

called for examination, having first been duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION BY MR. RUBENSTEIN:

Q Would you state your name, please, sir.

A Jose G. Puig.

Q Now, Doctor, I will be asking you a number of questions this morning and since you know the testimony will be recorded we want to make sure your answers are accurate and correct. So that if you do not understand a question just say so and I'll try to clarify it or if later in the deposition you want to change your prior answer, you have the opportunity to do that too. Do you understand that?

A Yes.

Q Doctor, what is your medical training?

[4] A I received my medical training in Madrid. I have my Bachelors of Science degree at the University of Houston, Texas, and I did my rotating internship in Puerto Rico, and after the rotating internship in Puerto Rico I served three years in Public Health, and after completing the three years with Public Health in the Commonwealth of Puerto Rico I came to the Psychiatric Institute for training as a resident in psychiatry. And I spent my residence training at Seton.

Then I became a member of the staff and I have been a physician for the Veterans Administration Hospital in Washington, D. C., and after that I have served as a consultant for the Mental Health Service of the Prince George's County, in the Silver Spring Mental Health Center and also in the Baltimore County as a consultant in the Mental Health Center of the northwestern section. And after a tour of that I've been in private practice up until the present and I have been working since 1978 with the Social Security Administration.

Q Just so I understand, you received your medical school training in Spain?

A In Spain.

[5] Q Did you get a degree in Spain?

A Yes, sir.

Q What was that degree?

A MD.

Q And after that you got a bachelors degree in science?

A No; before that.

Q Before that?

A Before that.

Q And that was in Texas?

A That's right.

Q What year did you get your medical degree?

A 1956.

Q Where were you living before you went to medical school; were you born in the United States or in Spain?

A I was born in Puerto Rico.

Q And you got your undergraduate training in Texas?

A Right.

Q And then you applied to medical school in Spain?

A Correct.

Q Now, where was it you did your internship?

[6] A In Puerto Rico.

Q I'm sorry. Your residence? I didn't understand the name,

A Seton Psychiatric Institute here in Baltimore.

Q When did you enter private practice?

A 19—probably 1969 or '70, around that time.

Q Did you have any specialty in that private practice or was it a general—

A General psychiatry.

Q Are you still in that same practice?

A I do consult sometimes, yes.

Q Is it an active practice now?

A Not very active, no.

Q When did you begin working for the Social Security Administration?

A 1978, '77, '78.

Q And what was your capacity then?

A I was a consultant in psychiatry.

Q And was that a part-time position?

A Full-time.

Q So you were a paid staff member of the Social [7] Security Administration?

A Right.

Q Did you maintain your private practice at that time?

A Yes, very little.

Q And what was your next position at the Social Security Administration?

A When my predecessor retired I became chief consultant in psychiatry and neurology.

Q When was that?

A That was in 1980 I was acting then.

Q What month in 1980?

A I don't recall.

Q When did you become permenantly chief consultant?

A A year later.

Q And you are now chief consultant?

A Yes, sir.

Q And all this time you have had a full-time position at the Social Security Administration?

A Since I became part of the—

Q Yes, since 1978?

[8] A Yes.

Q And your private practice has just been on the side?

A Yes.

Q The positions you mentioned before with the Veterans Administration, with Prince George's County, were those prior to 1978?

A Yes.

Q Are you Board certified in psychiatry?

A I'm Board eligible.

Q Are you a member of any professional associations?

A The American Psychiatric Association.

Q Anything else?

A Not anymore. I used to be a member of the American Medical Association. Not anymore.

Q How long have you been a member of the American Psychiatric Association?

A Almost twelve years, going to thirteen.

Q Are you active in any American Psychiatric Association committees or task forces or any—

A No, I don't. I don't have time.

* * * * *

[31] Q Now, what inference do you draw concerning that person's functional incapacity if the rating is either a three or four? Let's start with a five. What inference do you draw concerning the person's residual functional capacity if the person's rating is a five?

A He has no residual functional capacity at all.

Q And if the person's rating is a three or a four what inferences do you draw concerning the person's residual functional capacity?

[32] A That there is something that this person can participate in.

Q What do you mean participate in?

A In work-related activities.

Q And you agree with Dr. Blumenfeld on that point?

A What do you mean?

Q Does Dr. Blumenfeld agree with you, the statements that you just made?

A I suppose so.

Q So are you aware of the court decision in Minnesota Health Association—Mental Health Association of Minnesota versus Schweiker?

A Yes.

Q Have you read that opinion by the judge?

A Yes.

Q Have you read any testimony that was given in the case?

A I have read it, yes.

Q Like Dr. Blumenfeld's testimony?

A Yes; yes.

Q In that hearing Dr. Blumenfeld testified, this is [33] the question and answer that appears on page 64:

Question, "And is it also your understanding that nationwide physicians engaged in the medical component of evaluation of a claim for mental impairment would or

should conclude that a person who did not meet or equal the listings would retain functional capacity for unskilled work activity; is that correct?"

Do you agree with Dr. Blumenfeld's testimony in that respect?

A I agree with the regulation.

Q Do you agree with the statement that he made?

A All right.

Q Yes?

A Yes.

* * * * *

[92] Q. So it's your judgment that there are circumstances when a workshop evaluation would be useful?

A. Yes.

Q. But your office or anyone above you in the central office doesn't provide any specific guides to the field as to when those circumstances exist?

A. I think it's in the Informational Digest which is a supplement given to every DDS so they can determine when they can do it.

Q. Can you give my some examples of when a workshop evaluation would be appropriate?

[93] A. Whenever we don't have the sufficient information to see how this individual would function in a workshop evaluation.

Q. When you not have that information? For example, suppose they have a consulting examiner's report in the file.

A. And he says in the file it will be advisible to have this claimant go through a workshop evaluation, well, that's one indication that—

Q. So when the consultant examiner recommends a workshop evaluation, that will be one circumstances where it's appropriate?

A. Yes.

Q. What if the consulting examiner didn't find – didn't make that recommendation but all you had in the file was, aside from the functional information the only medical information you had was the consulting examiner's report, would you think generally a workshop evaluation should be required?

MR. KOOLYK: Dr. Puig, excuse me. Un'ess you can explain to me, which I might be missing, how it's relevant to this lawsuit, what information is obtained and put into the [94] file upon which Dr. Puig or other people make the determination as to whether or not someone is impaired, I direct Dr. Puig not to answer this line of questioning.

MR. RUBENSTEIN: I'm sorry. I don't understand.

MR. KOOLYK: This lawsuit, as I understand it, is not about the development of evidence in mental impairment cases.

MR. RUBENSTEIN: It's true. It's about the substantive standards and it's our contention that the inferences they draw are not based on factors that are relevant to the determination that they draw, the inference they draw. Okay? I'm not sure I phrased that, I didn't phrase that contention correctly. It was a little awkward but the point is that it seems very relevant to us whether they are drawing inferences without relying on evidence that could give those –

MR. IMPERATO: You're talking about the claim now as opposed to the standard –

MR. RUBENSTEIN; Well, you're talking about it from a different perspective. When we say substantive standards are at stake in this case we mean it, but that also [95] means that the substantive standard to some extent is going to determine the kind of evidence you have from which you draw the inferences. It doesn't mean you haven't gone through a proper step –

MR: KOOLYK: You're asking him, you know, how does he know when a vocation report should be, you

know, put into the file. Now, don't you agree that that's a question that goes to develop the report rather than making the substantive determination?

MR: RUBENSTEIN: Well, it obviously has to do with developing the record as a piece of evidence but it also has to do with what there will be, what evidence there will be with respect to what the substantive standard is. For example, if they say that we don't think workshop evaluations are necessary, we argue that they are using a substantive standard which makes them –

MR. IMPERATO: You mean you're saying in essence that determining the residual function capacity – in other words, step four of the sequential evaluation would determine residual functional capacity including the introduction of a workshop's value into each record.

[96] MR. RUBENSTEIN: No, no. No one contends that as far as I know. There has to be a workshop evaluation in every case –

MR. KOOLYK: This is something that came up in the discussion before Judge Weinstein and that's why I wanted to make a point of it.

MR. RUBENSTEIN: Right. If this were a procedural case we would say hey, you have got to do this in every case, this is critical to development of evidence. We don't so contend. It's not a necessary procedural issue. It's relevant to the substantive issue because their practice elicits what the substantive standard is. It's an unusual case in that had what the substantive standard is in dispute and this sheds light on what that standard is and that's why it's relevant, not because we say they must do it in every case but whether or not they do it tells us something about the standard they're using. I think that's the best way to articulate it and that's why it's relevant. So I would I think it would –

MR. IMPERATO: Does it assume that workshop evaluations – because I still don't understand.

[97] MR. RUBENSTEIN: I asked him whether they were used.

MR. KOOLYK: Yes, I agree that it seems to me that under that theory it's – you're basically saying that in order to find out under what substantive standards cases are decided we have to find out what evidence is aduced and in order to find out what evidence is aduced we're going to inquire into now Social Security develops evidence for the record. If that's what the case is going to turn into –

MR. RUBENSTEIN: Let me just say one more thing. I think it's a very different claim to say they must develop certain evidence in certain classic cases, in every case in a certain way. That's one kind of claim and that's the kind of claim that's raised in other cases. It is not being raised in this case.

It's quite another to say that the kind of information they consider relevant sheds some light on what standard they are using and that's all that's being elicited for, and I think it's quite different.

MR. BERGDAL: That's precisely what I was going to say. What the Social Security Administration considers to be [98] relevant and irrelevant I think is highly relevant to what the standard is.

MR. RUBENSTEIN: Of what the standard is.

MR. IMPERATO: Well, we know workshop evaluations are utilized in certain claims.

MR. RUBENSTEIN: That's what Dr. Puig just said.

MR. IMPERATO: I mean, you wouldn't contend that workshop evaluations are categorically not used in workshop –

MR. RUBENSTEIN: I think we contend they were never solicited but I don't think we contend they were never used.

MR. IMPERATO: So if you're contending that they were never used –

MR. RUBENSTEIN: No, we're not contending they were never used.

MR. IMPERATO: You are saying that they are used in certain individual claims? How does that shed light on the standard?

MR. RUBENSTEIN: We're claiming they're rarely if ever solicited.

MR. IMPERATO: How are they used in individual [99] claims?

MR. RUBENSTEIN: Someone can get one on his own.

MR. KOOLYK: I think on the ground rules under which we're operating this litigation, that Social Security gets everything that it would need to decide the claim in a proper manner – if that's not exactly the words that were used before Judge Weinstein it's close – and on the basis of that I don't think that I can allow you to answer these sorts of questions.

MR. RUBENSTEIN: This is going to be very time-consuming. I thought this was going to take ten minutes.

MR: KOOLYK: Well, maybe it will cut out a lot of time. It might even cut out the depositions in the future.

MR. IMPERATO: I think the doctor just testified he recommends the workshop evaluation that was obtained.

MR. RUBENSTEIN: He testified that it's up – that that's one circumstances where it might occur but in respect to his objection I think we stand by the position that the issue in this case is what is the substantive standard and this testimony, these questions, are relevant to what that [100] standard is and you will – if I were you, I would preserve it for trial.

MR. KOOLYK: If it's only a few questions, why don't you proceed and we can stop again.

MR. BERGDAL: Off the record.

(Discussion held off the record.)

BY MR. RUBENSTEIN:

Q. Okay. We're talking about cases in which the evidence only showed a consulting examination with no recommendation for workshop evaluation. Understand?

A. Yes.

Q. In that example or in that instance would there be circumstances in which the Social Security Administration or it's agents would obtain a workshop evaluation?

A. If it's indicated I imagine that they will go forward. I presume that they will go forward if it's indicated.

Q. Who is the they?

A. At the DDS.

Q. And how does one determine whether it's indicated, they determine it's indicated?

[101] A. They determine when it's indicated.

Q. Do you know if any guidance has to the local agencies from the central office concerning when a workshop is indicated?

A. Informational Digest, I think.

Q. You don't know the number, do you?

A. I don't recall the number, no, but I know it was one Informational Digest that specifically addressed that issue.

Q. Have there been any recent efforts by the medical staff within the last six or eight months to further elaborate the circumstances when a workshop evaluation should be used?

A. Basically an individual basis, when we see a case that merits one we ask for one.

Q. I'm just asking if there have been any efforts to develop further guidance on this question.

A. None that I know of.

Q. Are you familiar with the program circular – I'm sorry I don't have a copy – let me strike this.

Did you read the decision in the court case in [102] Minnesota concerning mental impairment cases?

A. I read the whole thing but I don't – what it is that your –

Q. Did you see a program circular which said that, among other things, that no inference could be drawn that that person had the residual functional capacity to do unskilled work from the fact that the person failed to meet listings?

A. What?

Q. Did you see a program circular to that effect?

A. I don't recall it; I mean, just that but – let me hear the question.

Q. Has there been any change in Social Security policy as far as you are aware concerning the kind of inferences that one can draw concerning a person's residual functional capacity if they have a mental impairment and fails to meet or equal the listings? When I say changes, I mean changes in the last six.

A. Positive or negative or what.

Q. In any direction?

A. I really can't recall.

[103] Q. Let me look at Exhibit 1 again, question 3. I believe I asked you about question 3 before. On tab C.

A. Question 3?

Q. Yes. Are you aware of an program circulars or any other information which has provided a different answer than the answer provided in question 3 of Exhibit 1, Tab C?

A. Nothing comes to mind.

Q. So you haven't seen any change in policy from that reflected in Exhibit 1 before you?

A. That I recall, no.

* * * * *

[Exh.1]
SD2B4 December 16, 1982

D15-4

Mr. Lloyd D. Moses
Associate Commissioner
Office of Disability Determinations
40 North Pearl Street
Albany, NY 12243

Dear Lloyd:

Attached is Central Office's reply to your suggested revisions to the guidelines for evaluation of mental disorders. They have also provided comments on the three questions raised in your letter of June 29, 1982. (We have not included the material forwarded by CO under TAB A as this consists only of your original letter and attachments plus our cover memo.)

CO has not agreed with most of your suggested revisions. However, they advise that the points raised will be considered in development of further guidelines (see TAB B). Those draft POMS sections cited in TAB B which we have seen thus far have previously been forwarded to your agency for comment.

We suggest that if you have further questions in this area that you hold them pending issuance of the national guidelines currently being developed.

Sincerely yours,
John Allocca
Program Administrator
Disability Programs

Attachment

cc: JA
MG
CM
NYDDS - Mae Blatt

[TAB A]
DEPARTMENT OF HEALTH & HUMAN SERVICES

Refer to SJH-41
Your Reference: SD2B4

Date: Nov 12 1982

From: Associate Commissioner for Operational Policy and Procedures

Subject Suggested Revisions to Guidelines for Evaluation of Mental Impairments (Your Memo, 7/19/82)—INFORMATION

To: Regional Commissioner
New York

This is in response to the questions and suggestions by the New York Disability Determination Services (DDS). We purposely delayed our response until after our discussion of psychiatric evaluation issues with a Blue Ribbon staff in September. We wanted our responses to reflect this group's consideration of the issues raised by the New York DDS. Additionally, we discussed this request and the broad issue of the evaluation of mental disorders in our meeting with your staff in New York on September 24, 1982. Further, our activities in improving guidelines for mental disorders will be covered in our meeting with assistant regional commissioners and branch chiefs on November 16-17. As you can see from the list at tab B, there are 11 major activities underway. Please be assured that the points you have raised are being considered in the development of these items. Specific responses to your points are at tab C. Your continued interest and input in

in this complex area are appreciated. If your staff have questions, they should contact Ray Easley, Division of Preadjudicative Policy, on FTS 987-1586.

Sandy Crank

Attachments:
Tab A – Your Memo, 7/19/82
Tab B – Evaluation of Mental Impairments--Activities Underway
Tab C – Responses to DDS Questions and Suggestions

[TAB B]

Evaluation of Mental Impairments
Activities Underway

- Issue additional guidelines on how to evaluate psychiatric symptoms. (POMS DI 2205.1)
- Provide more definitive guides on the evaluation of mental disorders. (POMS DI 2211)
- Provide more definitive guides on the evaluation of residual functional capacity (RFC) for mental impairments. (POMS DI 2212)
- Issue additional guidelines on how to evaluate long-term chronic mental impairments. (POMS DI 2213)
- Issue additional guidelines regarding use of the psychiatric review form (PRF) which may lead to a finding of medical equivalence in evaluating mental disorders. (POMS DI 2211)
- Issue guidelines on how to identify mental requirements of jobs.
- Improve guidelines on how to evaluate nonexertional and combined exertional and nonexertional impairments. (POMS DI 2388.1-2388.4)
- Analyze the effectiveness of workshop evaluations in claims involving mental impairments.
- Improve the content of the consultative examination (CE) report for psychiatric disorders. (POMS DI 2027.1)
- Update the Listing of Impairments criteria for mental impairments.
- Issue guidelines on how to handle cases involving potential suicide or homicide.

[TAB C]

Response to DDS Questions and Suggestions

1. Q. When does a psychiatric impairment meet the listings?

A. It is difficult to answer so broad a question except to say that a psychiatric impairment meets the listings when the specific medical findings describing the impairment match the severity and duration of a set of findings in the Listing of Impairments. We can appreciate that the basis for the question may be a problem in understanding the application of the part B (12.02, 12.03, 12.04) functional restrictions. We are in the process of providing supplemental guidance on this issue in POMS DI 2213 which should be released for publication in January 1983. These additional instructions should further clarify the intent and application of part B.

2. Q. When (if ever) can a psychiatric claim be allowed as "equaling" the listings?

A. An impairment, including a mental impairment, can be found to equal the listings if it meets the requirements stated in Regulation 404.1526 and POMS DI 2103. The determination of medical equivalence is uncommon, or rare, in cases involving only a mental impairment because of broad categorization of mental impairments under Listings 12.02-12.05; however, this may occur. The circumstance is most easily explained by referring to the area ratings on the psychiatric review form. For example, medical equivalence will usually be considered if the rating under effective intelligence is 3 and the rating of either affective status or reality contact, or a combination of the two, is 4. This would result in a total rating of 5, but it may not be possible to identify a single listing as being met.

3. Q. When can a psychiatric claim be allowed on a medical/vocational basis due to restricted RFC, despite the

absence of adverse vocational factors?

A. Never. There must be adverse vocational factors in order to support a medical/vocational allowance. The degree of adversity required, however, is determined in conjunction with the residual functional capacity (RFC), and all three vocational factors need not be adverse to warrant an allowance when the RFC is markedly reduced.

DDS Suggestions on Section 12.00A of the Listing of Impairments

1. (Marked Restriction of Daily Activities)

DDS Suggestion:

Limitation of activities to those necessary for maintaining life at a very basic level will not be inconsistent with listing-level severity. Thus, a claimant whose activities consist only of keeping himself/herself sheltered, fed and clothed, as well as obtaining medical treatment, may still meet the listings if the requirements of part A of the above listings are met.

However, once a claimant engages in activities which are similar to those required for "normal" working and living, the listing would not be met. Examples of these activities would include:

a. Regular independent travel.
b. Engaging in hobbies.
c. Participating in social and/or community activities.
d. Regular reading, listening to radio, watching television and movies.

Response:

The recommendation is made that "a claimant whose activities consist only of keeping himself/herself sheltered, fed, and clothed, as well as obtaining medical treatment, may still meet the listings if the requirements of part A of the above listings are met." While this may be essentially true, we believe this is too general and we find it difficult to rephrase it in a manner that it can be generally applied.

For example, an individual who would not meet the listings may still have to devote all of his/her activities to obtaining shelter, food, clothing, and medical care. The part B restrictions are required to provide the necessary definition to the impairment severity. Moreover, many people do not engage in hobbies or participate in social and/or community activities. The absence of such activities would not be determinative. If they were present, the quality and meaning would have to be considered.

2. (Constriction of Interests)

DDS Suggestion:

Total involvement in one's self with concern only for the stability of one's mental condition, would be consistent with the kind of restriction of interests contemplated in the listings.

Response:

An individual may be extremely self-centered and concerned with his/her mental condition and not have an impairment which meets or equals the listings or is disabling.

3. (Deterioration of Personal Habits)

DDS Suggestion:

Evidence of the above is not required to meet Listing 12.03 (functional psychotic disorders). A neat appearance at a consultative examination would not, by itself, be evidence that a claimant does not meet a listing. The claimant's family may be responsible for what is actually an atypical appearance.

Response:

An individual's neat appearance, particularly at a consultative examination, would not necessarily be considered to conflict with fulfilling this requirement in Listings 12.02 and 12.04. The independence of the activity would have to be evaluated. A future POMS section will include a statement to emphasize the necessity of considering the independence and quality of activities.

4. (Seriously Impaired Ability to Relate to Other People)

DDS Suggestion:

Maintaining relationships with preexisting family and/or treating sources would not be inconsistent with listing-level severity. However, the following would be evidence that the claimant's ability to relate to others is not seriously impaired:

a. Seeking and establishing friendships.
b. Regular visits to others.
c. Engaging in voluntary work in the community.

Note: Where objective evidence establishes that the claimant's impairment causes relationships to be abnormal, e.g., the paranoid person who relates to others but then "acts out" delusions, it would not be appropriate to say that the claimant can relate to others.

Whenever data to document the above criteria are in conflict or not available from the records of claimant's treating sources, a psychiatric social survey, performed at claimant's home and including evidence from family and neighbors, should be obtained.

Response:

There are many situations in which individuals who are not severely impaired restrict their contacts to preexisting relationships with family and friends. The note that it would not be appropriate to find that an individual can relate to others if objective evidence establishes the relationships are abnormal, e.g., "the paranoid person who relates to others but then 'acts out delusions,'" needs elaboration. What is the manner of the relationships? What are the delusions? In what way is there acting out?

Although additional information should be obtained to resolve conflicting information, if that information is not available from the treating sources' records, we are unable at this time to determine whether the best source of this information is a psychiatric social survey. As more informa-

tion on the use and effectiveness of a psychiatric social survey is obtained, we will evaluate this approach to determine whether this source of information will provide the kind of evidence needed to resolve the impairment severity issue in such claims.

Suggestion on Revision of POMS 2382.1.e, Assessment of Residual Functional Capacity

DDS Suggestion:

A finding that a claimant cannot perform the mental functions of unskilled work will be made when, based upon all of the relevant evidence in the file, the DDS staff physician in performance of his responsibility under POMS 2382.1E decides the claimant cannot perform one or more of these functions. (The DDS then listed some examples in which such a finding would be appropriate.)

Response:

While we agree that it would be appropriate to consider such information as that shown in the examples, we believe the basis for a decision that a claimant cannot perform the mental functions of unskilled work activity should be based on a comprehensive assessment of the individual's impairment. Undue emphasis should not be placed on either a single positive or negative finding. Instead, a broad range of findings concerning the claimant's mental illness over a representative period of time must be considered and any statement, such as "acting out delusions", must be explained. POMS DI 2213 – Evaluation of Chronic Mental Impairments – to be published in January 1983, emphasizes the importance of obtaining such evidence to permit a longitudinal approach to the evaluation of mental disorders.

[Exh. 3]

Suggested Addition – Introduction to Psychiatric Listings

12.00 MENTAL DISORDERS (Suggested second paragraph).

The following guidelines should be used to determine whether the degree of limitation imposed by the claimant's impairment meets the level of severity required in Part B of 12.02, 12.03, and 12.04.

1. *Marked Restriction of Daily Activities*

Limitation of activities to those necessary for maintaining life at a very basic level will not be inconsistent with Listing-level severity. Thus, a claimant whose activities consist only of keeping himself/herself sheltered, fed and clothed, as well as obtaining medical treatment, may still meet the Listings if the requirements of Part A of the above Listings are met.

However, once a claimant engages in activities which are similar to those required for "normal" working and living, the Listing would not be met. Examples of these activities would include:

a. Regular independent travel
b. Engaging in hobbies
c. Participating in social and/or community activities
d. Regular reading, listening to radio, watching television and movies.

2. *Constriction of Interests*

Total involvement in one's self with concern only for the stability of one's mental condition, would be consistent with the kind of restriction of interests contemplated in the Listings.

3. *Deterioration in Personal Habits*

Evidence of the above is not required to meet Listing 12.03 (functional psychotic disorders). A neat appearance at a consultative examination would not, by itself, be evidence that a claimant does not meet a Listing. The claim-

ant's family may be responsible for what is actually an atypical appearance.

4. *Seriously Impaired Ability to Relate to Other People*

Maintaining relationships with pre-existing family and/or treating sources would not be inconsistent with Listing-level severity. However, the following would be evidence that the claimant's ability to relate to others is not seriously impaired:

a. Seeking and establishing friendships
b. Regular visits to others.
c. Engaging in voluntary work in the community

Note: Where objective evidence establishes that the claimant's impairment causes relationships to be abnormal, e.g., the paranoid person who relates to others but then "acts out" delusions, it would not be appropriate to say that the claimant can relate to others.

Whenever data to document the above criteria are in confict or not available from the records of claimants' treating sources, a psychiatric social survey, performed at claimant's home and including evidence from family and neighbors, should be obtained.

[Exh. 4]

Revision of POMS 2382.1C Assessment of Residual Functional Capacity

Other Limitations – The RFC assessment also includes an evaluation of the ability to perform other significant physical functions such as reading and handling as well as seeing, hearing, and speaking; and to perform the mental function of unskilled work such as understanding, carrying out and remembering instructions, and responding appropriately to supervisors, co-workers, and customary work pressures in a routine work setting.

A finding that a claimant cannot perform the mental functions of unskilled work will be made when, based upon all the relevant evidence in the file, the DDS staff physician in performance of his responsibility under POMS 2382.1E decides the claimant cannot perform one or more of these functions. The following are some of the situations in which such a finding would be appropriate:

1. In a case of Organic Brain Syndrome a treating physician or CEMD provides evidence that the claimant constantly forgets that which he was recently told and cannot carry out simple oral instructions.

2. In a case of schizophrenia-paranoid type, the claimant becomes hostile or suspicious of most individuals with whom he comes into contact and has a history of "acting out" his delusions.

3. In a case of schizophrenia in which there is a significant history of hospitalization due to psychotic breakdowns, current mental status examination shows difficulty in adapting to potentially stressful situations, e.g., travelling alone or being examined by a CEMD.

4. In any psychiatric case in which evidence from a sheltered workshop or similar facility shows that, due to a mental impairment, the claimant was unsuccessful in maintaining satisfactory attendance or meeting quantitative or qualitative standards.

5. In a case of schizophrenia where medical evidence documents that, because of a long history of treatment for psychosis, it is unlikely the claimant could respond appropriately even to customary work pressures in a routine work setting. The following would satisfy the requirements of a "long history":

A history of repeated psychiatric in-patient hospitalizations over the 5 year period prior to application together with continuous out-patient followup during the intervals between hospitalizations. Out-patient treatment could include after-care, convalescent care, family care, day-treatment centers, half-way houses, etc. The in-patient admissions should average 3 year and the lengths of stay should occupy at least 25% of the time. (All of the above must be documented by appropriate progress notes, interim summaries, periodic reviews, etc.)

DEFENDANTS' EXHIBIT BB

(PPS-64) **SSR 82-30**

(Supersedes PPS-16 (SSR 78-8))

TITLES II AND XVI: RESPONSIBILITY FOR RESIDUAL FUNCTIONAL CAPACITY ASSESSMENTS

PURPOSE: To amplify the policy concerning the responsibility for assessing (or determining)[1] residual functional capacity (RFC) for cases decided in the Disability Determination Services (DDS) and at the hearing and Appeals Council (AC) levels, as delineated in the recodified regulations. This PPS supersedes Program Policy Directive (PPD) No. 16 (SSR 78-8), Residual Functional Capacity.
CITATIONS (AUTHORITY): Sections 223(d)(2)(A) and 1614(a)(3)(B) of the Social Security Act, as amended, and Regulations No. 4 Subpart P, sections 404.1513, 404.1527, 404.1545, and 404.1546 and Regulations No. 16, Subpart I, sections 416.913, 416.927, 416.945, and 416.946.
PERTINENT HISTORY: PPD No. 16, published as SSR 78-8, provided that although the responsibility for the RFC assessment which is consistent with the evidence in file rests with the DDS staff physician, assessment of functional capacity should preferably be reported by a physician who has examined the claimant. Thus, the DDS staff physician was to provide an RFC assessment only when an assessment of functional capacity had not been provided by a medical source or when the DDS staff physician did not fully agree with the assessment provided by the source.

Experience with this method of documenting a claimant's RFC has shown that the RFC assessment used for disability determination purposes has frequently been incomplete in that it did not reflect an assessment of all

[1] In this context, the terms "assessing" and "determining" are interchangeable.

the pertinent medical findings. Even where only one examining physician was involved, the physician ordinarily could not be expected to be fully aware of the program's criteria for making an RFC assessment.

The disability regulations as recodified on August 20, 1980, set forth the responsibilities for assessing RFC. As stated in the regulations (sections 404.1546 and 416.946), in cases where the DDS makes the determination, a DDS staff physician must assess RFC where it is required. Then, in determining disability, the RFC assessment must be considered in connection with the vocational criteria (sections 404.1560-404.1569 and 416.960-416.969). For cases decided at the hearing or AC levels, the responsibility for assessing RFC, as well as for deciding the issue or disability, rests with the administrative law judge (ALJ) or the AC.

It should be noted that under the regulations (sections 404.1513(c) and 416.913(c)), an important role of reporting medical sources is to provide a medical assessment of the claimant's ability to do work-related activities. However, this medical assessment (based on the physician's own observations and objective medical findings) is different from and is not intended to become the assessment of RFC (an administrative determination based upon all the relevant evidence). Medical assessments should be used by the DDS, the ALJ, or the AC, along with the other evidence, in making RFC assessments (as explained in sections 404.1513(d) and 416.913(d) of the regulations). The RFC assessment is then used by the DDS, the ALJ, or the AC in determining whether the individual can do past relevant work and, if not, whether the individual can do other work.

POLICY STATEMENT: In determining whether an individual is disabled, a sequential evaluation process is followed whereby current work activity, severity and duration of the impairment, and vocational factors are considered in that order. Before vocational factors can be considered, an RFC assessment is required. This assessment is based on all the relevant evidence, and it includes descriptions of the physical, mental, and sensory capacities and any environmental restrictions which may affect the individual's ability to function in a working setting.

In assessing RFC, the evidence provided by medical sources must be evaluated. This evidence should include the medical history, clinical findings, laboratory findings, diagnosis, treatment prescribed and response, prognosis, and a medical assessment describing ability to do work-related activities, as discussed in sections 404.1513(c) and 416.913(c). When more than one physician has provided medical information, the information provided by each source must be considered in the assessment of RFC. In making the RFC assessment, any medical assessments which are not supported by all of the medical evidence should be clearly rebutted.

The responsiblity for assessing RFC in cases at the initial and reconsideration levels rests with a physician designated by the Secretary, ordinarily a DDS staff physician. In these cases, the DDS staff physician is responsible for assuring that the record contains the medical findings and other information necessary to support his or her RFC assessment. At the hearing and AC levels, the ALJ or AC, as appropriate, has the responsibility for making the RFC assessment, as well as the responsibility for assuring that the RFC assessment is supported by the medical findings and other information. When making the RFC assessment, the ALJ or AC will give probative weight to the DDS staff physician's RFC assessment. Although it is not binding, it is a medical judgment and constitutes expert opinion evidence. When additional evidence is received, the ALJ or AC, as appropriate, will determine what effect it has on the claimant's RFC.

If a further medical assessment of a claimant's ability to do work-related activities is needed, the ALJ or AC may request this medical assessment from a treating or examining physician through the DDS. An RFC assessment, as such, will not be requested from a treating or examining physician since the responsibility for assessing RFC is with the DDS staff physician, the ALJ, or the AC, as appropriate. Where the ALJ wishes to obtain an additional expert medical opinion to assist him or her in assessing RFC, the ALJ may call on the services of an Office of Hearings and Appeals' medical advisor. For cases before the AC, the AC may call on the services of its medical support staff.
EFFECTIVE DATE: These policies are effective for any case adjudicated on or after August 20, 1980, the date the final recodified regulations were published in the **Federal Register** at 45 FR 55566.
CROSS-REFERENCES: Program Operations Manual System (POMS) DI 2003, 2011, 2382.1, and 3027.

Supreme Court of the United States

No. 84-1923

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

ORDER ALLOWING CERTIORARI. FILED OCTOBER 7, 1985.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

U.S. GOVERNMENT PRINTING OFFICE: 1986 - 491-507/20516

REPLY

BRIEF

Supreme Court, U.S.
FILED
FEB 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1923

In the Supreme Court of the United States

OCTOBER TERM, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1923

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Respondents urge the Court to make a drastic revision of the jurisdictional principles that govern actions for judicial review under 42 U.S.C. 405(g). Section 405(g) provides that a claimant may obtain judicial review only of the Secretary's "final decision" made "after a hearing to which he was a party." Yet respondents argue that the district court had jurisdiction over the claims of thousands of individuals who never requested a hearing (despite being notified of their right to do so) and who never obtained the requisite "final decision" on their individual claims for benefits. In so arguing, respondents explicitly endorse the "case-by-case balancing test" (Br. 26) adopted by the court of appeals, which permits a court to dispense with exhaustion based on its own assessment of various factors in order to reach a "just result" under the circumstances (Pet. App. 13a). Respondents' submission not only is directly inconsistent

with the language and purposes of Section 405(g) and with this Court's decisions construing that Section; it also is a totally unworkable approach to the questions of administrative finality and subject matter jurisdiction under a program in which millions of claims for benefits and thousands of actions for judicial review are filed each year.

Section 405(g) further provides that an individual must commence an action for judicial review "within sixty days after the mailing to him of notice of [the Secretary's final] decision or within such further time as the Secretary may allow." Yet respondents argue that the district court properly exercised jurisdiction over the claims of individuals whose claims were denied as far back as April 1, 1980, almost *three years* before this suit was filed. Respondents do not suggest that the Secretary has allowed these time-barred class members additional time within which to seek judicial review (or further administrative review), pursuant to his authority in 42 U.S.C. 405(g) and implementing regulations. Nor do they suggest that any such class member ever requested that relief from the Secretary. Respondents nevertheless argue that the district court could dispense with the 60-day filing requirement because the preliminary decisions denying some of their claims may have resulted from an allegedly erroneous application of governing regulations that was contained in internal agency memoranda. Acceptance of this sweeping exception would fatally undermine the finality and repose that Congress deemed essential when it enacted the 60-day filing requirement. See *Califano* v. *Sanders*, 430 U.S. 99, 108 (1977).

We have largely answered respondents' jurisdictional arguments in our opening brief. We therefore shall concentrate here on respondents' extravagant factual assertions and distortions that underlie those arguments. For despite respondents' rhetoric, nothing in the circumstances of this case suggests an occasion for the sort of radical departure from settled jurisdictional principles that they propose.

A.

1. Respondents' basic premise is that the mental impairments of the claimants and the actions of the Secretary combined to prevent the unnamed class members from seeking review of the state agency's denial of their claims—or at least should excuse their failure to do so. To the extent that respondents argue that claimants seeking benefits on the basis of an alleged mental impairment should be categorically excused from the exhaustion and 60-day filing requirements in 42 U.S.C. 405(g), that argument must be presented to Congress, not the courts. Congress expressly provided in 42 U.S.C. 421(d) that a person who is dissatisfied with the determination by a state agency under 42 U.S.C. 421(a) that he is not "under a disability" shall be "entitled * * * to judicial review of the Secretary's final decision after [a] hearing as is provided in section 405(g) of this title." The term "disability" in turn is specifically defined to mean the inability to engage in substantial gainful activity "by reason of any medically determinable physical or *mental* impairment" (42 U.S.C. 423(d)(1)(A) (emphasis added)). Congress thus explicitly provided that the same jurisdictional rules that apply under 42 U.S.C. 405(g) generally—including the established exhaustion and 60-day filing requirements (see Gov't Br. 21-22)—are to apply to claimants seeking benefits on the basis of mental disability.

In any event, respondents' assertion that circumstances require a special exception to the jurisdictional rules for the unnamed class members in this case is fatally undermined by the experience of the eight named plaintiffs, all of whom alleged mental impairment and allegedly were subjected to the same actions by the Secretary of which respondents complain, but successfully negotiated the appeals process. See Gov't Br. 32-33. Seven of the eight named plaintiffs requested an ALJ hearing following the denial of their claims at the state agency level, thereby dispelling the

notion that mental impairments or the Secretary's practices somehow prevented the class members from pursuing their remedies. Two of these seven were awarded benefits by the ALJ, and the other five were denied benefits for reasons unrelated to the issues in this case.[1] This demonstrates that exhaustion was not a futile exercise and that the practices of which respondents complain were unlikely to play any role in the ultimate administrative disposition of the claims of the unnamed class members if they had sought review by an ALJ. Moreover, four of the five named plaintiffs who were denied benefits by the ALJ sought Appeals Council review and then filed their own individual actions for judicial review—and did so within the 60-day period under 42 U.S.C. 405(g) that respondents urge this Court to disregard for the unnamed class members.[2] There is no reason to believe that any of those class members who actually wanted to pursue their claims were categorically unable to take these same steps to preserve their rights. See also J.A.

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[1]Moreover, one of the five named plaintiffs whose claim was denied by the ALJ subsequently was found by the ALJ to be disabled after the Appeals Council granted his motion to reopen the decision (J.A. 128-128a (Richard Roe II); Resp. Br. 29). Similarly, the one named plaintff who did not request an ALJ hearing was found to be disabled after he filed a second application (J.A. 22-23 (Richard Roe III)).

[2]The claims of three of these four named plaintiffs subsequently were remanded by the district court for further proceedings. [*Jane Doe I*] v. *Heckler*, Civ. No. CV-83-0029 (E.D.N.Y. Jan. 12, 1984) (see Resp. Br. 29); [*Jane Doe III*] v. *Secretary of HHS*, Civ. No. CV-83-4140 (E.D.N.Y. Apr. 17, 1984); [*Richard Roe V*] v. *Heckler*, Civ. No. CV-83-4139 (E.D.N.Y. Aug 17, 1984). This relief in individual suits under 42 U.S.C. 405(g) of course demonstrates that concerning the determination of class members' entitlement to benefits were fully reviewable following the Secretary's "final decision" on any class member's claim for benefits. Compare *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). The fourth named plaintiff who sought judicial review ([*Richard Roe II*] v. *Heckler*, Civ. No. CV-83-3388 (E.D.N.Y.) (J.A. 22)) was subsequently awarded benefits without the need for judicial intervention. See note 2, *supra*.

issues

204-206, 217, 235-236 (testimony regarding appeals by other mentally impaired claimants).

2. Perhaps because they recognize the weakness and disruptive consequences of the court of appeals' broad jurisdictional rulings, respondents attempt to justify the reopening of the thousands of abandoned claims in this case by characterizing the application of the regulations they challenged as a "secret" policy. But as we pointed out in the certiorari petition (at 26-27) and our opening brief (at 48), there was no active concealment of the guidance that certain Social Security personnel furnished to the state agency. The courts below pointed to no such evidence, and the district court made no such finding.[3] To the contrary, the relevant documents were internal memoranda of the kind that are routine in a program of this dimension, and the various policy considerations were openly discussed within SSA and in communications with the state agency without any suggestion of a purpose to deceive claimants (J.A. 312-328, 350-362). Nor have respondents even now pointed to any evidence of deceptive or sinister practices or affirmative acts of concealment, despite our repeated references to the absence of any such evidence in the record. Undeterred, respondents once again assert that petitioners "concealed these practices from all concerned" (Br. 2) and "kept the existence of the policy secret" (*id.* 4). See also at 10-11, 14, 31, 36, 38-40. There is no reason to respond further to these unsupported assertions.

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[3]The characterization of the challenged application of the regulations by the courts below as "secret," "covert" or "clandestine" (Pet. App. 7a, 18a, 39a, 41a), upon which respondents rely (Br. 9), apparently reflects nothing more than the fact that the memoranda and other material were not affirmatively disclosed to the public. See Pet. App. 18a (policy "remained operative but undisclosed"); *id.* at 39a (counsel, social workers and advisers were "unaware" of its existence); *id.* at 41a ("unpublished internal memoranda").

3. Not content to persist in allegations of active concealment, respondents now also assert that the decisions denying the class members' claims at the state agency level and documents contained in the administrative records on those claims were "false," "misleading" and "fraudulent." See Br. 4, 11, 21, 22, 29, 30, 31-32, 37, 39, 44. Respondents did not make this argument below, and the courts below made no findings to support it. In any event, this allegation is without merit. At bottom, respondents simply disagree with the substantive standards applied by the state agency.

Respondents base their new argument on the manner in which the state agency adjudicator allegedly determined whether a claimant had the ability to work. See Br. 7-9. In order to bring greater reliability and consistency to the evaluation of mental impairments, SSA, after consulting numerous experts, developed a Psychiatric Review Form (the QED) in the late 1960s (Tr. 762-780). See J.A. 311 (PX 3; Tr. 27). That form identifies 17 criteria to be assessed within three major areas: effective intelligence, affective status, and reality contact (J.A. 311). The state agency's reviewing physician is to evaluate all of the evidence in the file and assign a numerical value from 1 to 5 to each factor and an overall rating of from 1 to 5 for the claimant. A rating of 1 means that the claimant is normal in that area, and a rating of 5 means that his impairment meets the listings in the regulations of the most severe impairments that are deemed to be automatically disabling at step 3 of the sequential evaluation process. See Gov't Br. 7-8. A rating of 3 or 4 means that the claimant's impairment is "severe" (for purposes of step 2 of the sequential evaluation process) but does not meet the listings. In that event, the state agency's reviewing physician must assess the claimant's residual functional capacity (RFC)—the abilities the claimant possesses despite his impairments. See generally DX T (Tr. 28). The case is then referred to a disability

analyst, who must determine whether, considering the claimant's RFC, age, education, and work experience, he can perform his prior job or other work. Pet. App. 33a-34a.

Several internal SSA memoranda stated that an overall QED rating of less than 5 signifies or will generally lead to a finding that the claimant has the RFC for unskilled work (PX 12 (J.A. 317a; Tr. 27); Compl. Exhs. A, B (J.A. 41, 47)), apparently because the ability to work was regarded as inversely proportional to impairment severity and the factors taken into account in using the QED to measure an impairment against the listings yielded an indication of the claimant's RFC (Tr. 778-780; PX 12 (J.A. 317; Tr. 27)). This did not eliminate the independent determination of whether the claimant could perform his former job or other substantial gainful activity; that remained a vocational, not a medical decision (J.A. 299). But as a matter of practical experience in the early 1980s, the conclusion that a claimant could do unskilled work was perhaps too readily inferred from his failure to meet the listings, and there accordingly were few findings of disability for younger workers based on vocational factors at steps 4 and 5 of the sequential evaluation process. Respondents contended below (J.A. 30-35), and the district court agreed (Pet. App. 30a-35a, 60a-61a), that this use of the QED gave "improper weight" to the failure of the claimant's impairment to meet the listings and created an unlawful "presumption" that such a person had the RFC for unskilled work (J.A. 30-35).

Against this background, respondents now contend that the documents evidencing the reviewing physician's RFC assessment and the state agency's decisions denying the class members' claims were "false," "misleading," "fraudulent" and a "lie" (Br. 4, 9, 21, 22, 29, 30, 32, 37). This is simply a mischaracterization. The decisions denying a claim typically stated that although there were some limitations on the claimant's abilities, he was able to do certain jobs,

such as one in which he would not work closely with other people or would perform simple tasks (see J.A. 60, 64, 87, 91, 102, 104, 106, 117, 134, 140, 142, 150). There is no reason to believe that the drafters of those decisions did not mean what they said. Respondents' objection is only that in arriving at those decisions, the state agency may have inappropriately used the QED and thereby applied substantive standards that were too stringent (J.A. 344-347), not that the decisions themselves were "false" in the sense in which that term is commonly understood.[4] Although SSA's or the state agency's approach might have been insufficiently individualized, it scarcely constituted affirmative "misconduct," as respondents maintain (Br. 42).[5]

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[4]The same is true of documents recording the determination of RFC. The only such document respondents cite (Br. 20-21, 29) is not a QED, but a "Residual Functional Capacity Assessment" (J.A. 158-158c) that was developed in 1982 to provide for the sort of more realistic assessment of RFC that respondents have urged (Tr. 698-699). Contrary to respondents' assertion (Br. 21, 29), there is no indication that this one RFC Assessment in the record was a "sham." That form, from the file of Richard Roe V, also is the evidence upon which respondents principally rely in arguing (Br. 20-21) that the challenged policy at the state agency level tainted subsequent administrative proceedings because the ALJ relied on the record developed by the state agency. However, although the ALJ who denied Richard Roe V's claim cited many other exhibits from the administrative record, he did not cite the RFC Assessment form. See J.A. 152-156. Compare J.A. 111a (rejecting reviewing physician's statement of RFC concerning Richard Roe I).

[5]Respondents cite (Br. 7-9) testimony and a memorandum of a Dr. Anne Geller, a psychiatrist who performed review functions in SSA's regional office, in support of the notion that physicians were "pressured" to make decisions that were contrary to their medical beliefs. Respondents' contention ignores the fact that a finding of disability is ultimately a legal, not a medical judgment, and that the Secretary must provide for the uniform application of governing standards irrespective of the personal views of individual physicians. Indeed, Dr. Geller stated her belief that there were legitimate differences in judgment and philosophical approach involved in disagreements over the appropriate ascertainment of RFC (J.A. 188), that her judgment "may be more lenient than somebody else" (*ibid.*), and that the SSA officials in Baltimore with whom she disagreed in fact believed that the claimants were capable of working within the meaning of the governing legal standards (*id.* at 195, 196-197).

4. Finally, respondents entirely divorce this case from its broader context. Although respondents cast their complaint in part as a technical objection to the way in which the QED was utilized and the regulations were applied, they also raised more general philosophical disagreements over the circumstances in which mentally impaired claimants should be regarded as capable of working and argued that a more realistic assessment of the claimant's ability to perform in a competitive work environment was necessary. J.A. 30, 32-33. See also J.A. 191, 208; PX 61, at 51-60, 81-86, 107-109 (Tr. 615). These are broad and difficult questions of statutory and social policy that do not lend themselves to resolution in litigation.[6]

Instead, it is Congress and the Secretary who are responsible for fashioning the policies affecting mentally impaired claimants under the Social Security Act, and each has been actively engaged in that endeavor. Both before and since this suit was filed, the Secretary instituted a number of measures in this regard, including steps to ease the impact of continuing disability reviews generally, the convening of a panel of mental health experts to address the guidelines for mental evaluations, the issuance of numerous policy statements, rulings and a new RFC form, and reevaluation and reissuance of a revised QED form. Tr. 661-662, 669, 678,

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[6]Indeed, the wide-ranging proceedings on these issues in this case were far removed from the sort of action for judicial review of a discrete agency decision that Congress had in mind when it enacted 42 U.S.C. 405(g). That Section on its face does not contemplate that a court will conduct any evidentiary hearing at all: it provides that the court may enter judgment "upon the pleadings and transcript of the [administrative] record" and that the case will be remanded to the Secretary for the receipt of any additional evidence.

687-688, 698. See also Gov't Br. 9-10. In addition, on June 7, 1983, the Secretary announced a moratorium on continuing disability reviews of most mentally impaired beneficiaries pending a reevaluation of the listings of mental impairments and related procedures. H.R. Rep. 98-618, 98th Cong., 2d Sess. 15 (1984).

Congress built on the Secretary's initiatives when it enacted the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.* In Section 5(a) of that Act, 98 Stat. 1801, Congress directed the Secretary to revise the mental impairment listings and specified that "[t]he revised criteria and listings, alone and in combination with assessments of the residual functional capacity of the individuals involved, shall be designed to realistically evaluate the ability of a mentally impaired individual to engage in substantial gainful activity in a competitive workplace environment." The legislative history makes clear that this requirement was intended to enable the Secretary to address the substantive issues identified in this case. See H.R. Rep. 98-618, *supra,* at 15. Congress also extended the Secretary's moratorium pending the publication of the new criteria and RFC procedures (§ 5(b), 98 Stat. 1801), which were published on August 28, 1985. 50 Fed. Reg. 35038.

Congress further provided in Section 5(c) of the 1984 Act, 98 Stat. 1801, that any mentally impaired person whose claim for initial or continued disability benefits was denied on or after March 1, 1981 could reapply and be reevaluated under the new criteria, with benefits to be paid on the basis of the new application.[7] Congress did not, however, provide

[7]Consistent with the representations in our reply brief (at 4-5) on the application for a stay that was granted by the Court in this case on July 1, 1985 (No. A-972), SSA sent notices to all members of the class whose claims were denied on or after March 1, 1981, informing them of their right to reapply for benefits under Section 5(c) of the 1984 Act.

for the reopening of the claims of all members of pending certified class actions raising the mental impairment issue, as it did in Section 2(d) of the 1984 Act, 98 Stat. 1797, with respect to class actions raising the medical improvement issue. Under Section 2(d), Congress provided for the redetermination of claims whether or not the individual class members involved personally satisfied the jurisdictional requirements of 42 U.S.C. 405(g). 130 Cong. Rec. S11454 (daily ed. Sept. 19, 1984)(remarks of Sen. Dole); *Heckler* v. *Kuehner,* No. 83-1593 (Nov. 5, 1984). Congress's refusal to grant similar relief from the procedural defaults by the unnamed class members in this case indicates that Congress deliberately intended to foreclose that relief. *United States* v. *Erika, Inc.,* 456 U.S. 201, 208 (1982).

The vast majority of the unnamed class members in this case are entitled to relief under the special provisions of the 1984 Act, either as members of the medical improvement class in *Schisler* v. *Heckler,* 107 F.R.D. 609 (W.D.N.Y. 1984), appeal pending, No. 85-6092 (2d Cir.),[8] or pursuant to the special reapplication provisions of Section 5(c) of the 1984 Act for mental impairment cases. See note 7, *supra.* In view of Congress's carefully crafted provisions for affording special relief as part of its thorough evaluation and correction of perceived systemic difficulties in the disability program, "it would be an unwarranted judicial intrusion into this pervasively regulated area" (*Heckler* v. *Day,* No. 82-1371 (May 22, 1984), slip op. 15) for courts to award additional relief that Congress withheld. There accordingly is no reason not to give effect to the explicit jurisdictional prerequisites Congress has set forth in Section 405(g).

[8]See the application for a stay pending certiorari (at 8-9 & n.6) in this case.

B.

Respondents urge the Court to adopt a "balancing approach" (Br. 18) to the question of exhaustion of administrative remedies, under which a court would make its own ad hoc assessment of whether the purposes of exhaustion would be served by postponing judicial review, the nature of the harm to the claimant, and the extent to which the issue involved is "collateral" to the merits. See Resp. Br. 16-25.

The most obvious defect in respondents' approach is that it is utterly inconsistent with the statutory text. Section 405(g) authorizes an individual to obtain judicial review only of the Secretary's "final decision" made "after a hearing." As we have explained (Gov't Br. 19-20), the specification that the formal administrative hearing must precede judicial review makes clear that Congress has vested the district courts with jurisdiction under 42 U.S.C. 405(g) to review only the Secretary's final administrative *judgment* on an individual's claim for benefits—at least in the absence of a wholly collateral issue that is subject to immediate judicial review under the collateral order doctrine of *Mathews* v. *Eldridge*, 424 U.S. 319, 330-332 (1976), and *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547 (1949). Respondents make no effort to reconcile their argument with the words Congress used. Nor do respondents even mention the regulations implementing 42 U.S.C. 405(g) that have been in effect since the inception of the Social Security program, which have consistently required full exhaustion through the Appeals Council stage as a precondition to judicial review and which were incorporated into the disability and SSI programs in 1956 and 1972. See Gov't Br. 22-24. The statutory text and implementing regulations bar jurisdiction here.

Incredibly, respondents assert (Br. 18) that *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), supports their judicial balancing approach to exhaustion. They are wrong. In *Salfi*, the Court held that the requirement that a claimant obtain the Secretary's "final decision" is a "statutorily specified jurisdictional prerequisite" to suit that may not be dispensed with by the district court even if it believes that exhaustion would be futile. 422 U.S. at 766. The Court further held in *Salfi* that the Secretary had the authority under 42 U.S.C. 405(a) to promulgate regulations that specify when a decision shall be regarded as final for purposes of judicial review (422 U.S. at 766), and it recognized that the governing regulations require a decision of the Appeals Council for that purpose (*id.* at 765). Those holdings control this case.[9]

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[9]Respondents discuss (Br. 19-21) the various purposes underlying administrative exhaustion that were identified in *Salfi* (422 U.S. at 765)—on the mistaken premise that a court may dispense with exhaustion if it believes that those purposes do not apply. That premise of course is inconsistent with the holding in *Salfi* itself that the final decision requirement is statutorily mandated and cannot be dispensed with by a court. It was on this basis that the Court in *Salfi* distinguished the exhaustion rule under 42 U.S.C. 405(g) from the judicially fashioned exhaustion principles in *McKart* v. *United States*, 395 U.S. 185 (1969), from which the Court derived the purposes underlying the exhaustion rule (422 U.S. at 765, citing 395 U.S. at 193-194). In any event, as we have explained in our opening brief (at 30-35), those purposes clearly would have been served by exhaustion here, especially since the named plaintiffs either received benefits in subsequent proceedings or were denied benefits on other grounds. See pages 3-4, *supra*.

In arguing that the purposes of exhaustion support judicial "waiver" of that requirement, respondents focus not on the class members' individual claims for benefits or the possibility that they might have recovered in further proceedings, but on whether exhaustion should be required with respect to the challenged SSA policy. See Resp. Br. 19-21. However, 42 U.S.C. 405(g) does not authorize judicial review of agency "policies" as such. It provides for review of a claim for benefits, and authorizes a court to consider an agency rule or policy only insofar as it has a bearing on the disposition of that claim.

Nor does *Eldridge* support a generalized "balancing" approach to exhaustion under 42 U.S.C. 405(g), as respondents seem to believe (Br. 18, 22-23, 28)—any more than a court of appeals may exercise jurisdiction under the identical "final decision" language in 28 U.S.C. 1291 by application of a balancing test. Instead, *Eldridge*, like *Cohen*, recognizes a carefully confined exception to the otherwise controlling final judgment rule. As we have explained (Gov't Br. 35-39), the legal issue in *Eldridge*, like that in *Cohen*, satisfied the familiar three-part test: it conclusively determined the disputed question, resolved an important issue completely separate from the merits of the action, and was effectively unreviewable on appeal from a final judgment. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. at 468.

Contrary to respondents' suggestion (Br. 28), the issue they raise concerning the assessment of a claimant's RFC does not even remotely satisfy that three part test. For example, respondents' assertion (Br. 28) that SSA's actions "conclusively denied" the class members their right to an individualized assessment of RFC at the initial determination and reconsideration levels obviously misses the point. The question for purposes of the *Eldridge/Cohen* test is whether the disputed question has been conclusively determined in a way that is binding in *all* administrative proceedings through the Appeals Council stage. Similarly, as even the court of appeals conceded (Pet. App. 14a), respondents' challenge to the method of determining RFC is not completely separate from the merits of the unnamed class members' claims for benefits; indeed, RFC is an integral part of the five-step sequential evaluation process that is designed to resolve the merits of a claimant's alleged disability and entitlement to benefits. Finally, respondents make the frivolous contention that the third prong of the collateral order test is satisfied because claimants did not

know of the existence of the challenged policy at the state level, and the issue of the legality of that policy therefore is effectively unreviewable in an individual action for judicial review under 42 U.S.C. 405(g). A Claimant's failure to identify and raise a legal issue does not render that issue effectively unreviewable by a court under the *Eldridge/-Cohen* test. The relevant inquiry is whether the court could effectively review the issues if it *were* raised. In this case, the assessment of RFC clearly is reviewable in an individual action under 42 U.S.C. 405(g).[10]

Finally, respondents err in contending (Br. 22-23) that a court may dispense with the exhaustion requirement because of its own perception that a claimant might suffer hardship as a result of the interlocutory denial of his claim on the merits. As we have explained (Gov't Br. 27-29), Congress and the Secretary established the administrative review mechanism with the generality of cases in mind—including those involving alleged mental impairments (see page 3, *infra*)—and they did not authorize circumvention of those procedures on the basis of a time-consuming inquiry into the circumstances of a particular claimant.

Respondents rely (Br. 22) on the Court's observation in *Eldridge* that the claimant there had "raised at least a colorable claim that because of his physical condition and

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[10] *Mitchell* v. *Forsyth*, No. 84-335 (June 19, 1985), cited by respondents (Br. 24, 28), likewise does not help their cause. The Court there held that a claim of qualified immunity, a claim of a right not to stand trial and is therefore subject to immediate appeal in the same manner as claims arising under the Double Jeopardy and Speech or Debate Clauses. Slip op. 13-15. This case obviously does not involve a right not to stand trial. Respondents rely on the observation in *Forsyth* that the claim of immunity was "conceptually distinct" from the merits, even though there was a factual overlap between the two. *Id.* at 15. Here, however, the manner in which RFC is assessed is a step toward resolution of the merits; it manifestly is not distinct, conceptually or otherwise, from the merits.

dependency upon disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments." 424 U.S. at 331. However, in that statement, the Court was simply referring to the nature of the constitutional argument that the claimant was making, which was that he had a due process right to a pre-termination evidentiary hearing before an ALJ because the retroactive award of benefits following the hearing would not afford him full relief. The Court concluded that this constitutional argument was at least colorable; and because the other criteria for an appealable collateral issue were satisfied, the Court held that the district court had jurisdiction under 42 U.S.C. 405(g) to consider that argument. But of course the Court then *rejected* the claimant's argument that the alleged injury resulting from the termination of benefits prior to the ALJ hearing was irreparable as a constitutional matter. 424 U.S. at 332-349. As a statutory matter, Congress has determined that a retroactive award of benefits at a subsequent stage of the proceedings is an adequate remedy for any injury that might result from an erroneous denial of benefits at a preliminary stage of the administrative review process, except in those situations in which Congress has provided for the continuation of benefits pending administrative review. See Gov't Br. 5, 22-23, 28-29. The courts below had no authority to overturn Congress's judgment and permit the unnamed class members to ignore the administrative procedures that have been carefully fashioned by Congress and the Secretary.

C.

Respondents also contend (Br. 31-45) that the district court had jurisdiction over the claims of the unnamed class members who received final decisions denying their claims more than 60 days before this suit was filed. Once again, however, respondents' jurisdictional argument simply can not be squared with the explicit terms of Congress's consent

to suit under 42 U.S.C. 405(g). That Section provides that an individual may obtain judicial review only "by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow." Thus, Congress has provided for only one exception to the 60-day time limit, which applies where the *Secretary* has allowed the claimant additional time within which to seek review. That exception has no application here, because the Secretary has not exercised his authority to extend the filing period for the unnamed class members, and in fact none of those claimants has submitted such a request under the implementing regulations that govern such extensions. See Gov't Br. 40. The existence of this one exception to the 60-day filing period reinforces the conclusion that Congress otherwise adhered to the established rule that limitations on the time within which a suit may be brought against the federal government are conditions on the waiver of sovereign immunity and define the jurisdiction of the court to entertain the suit. See Gov't Br. 42-46. The courts below therefore were not authorized to intrude their own notions of tolling into the statutory scheme.

The only decision of this Court upon which respondents rely (Br. 33,36, 38, 40) that involved a suit against the federal government is *Honda* v. *Clark*, 386 U.S. 484 (1967). However, that decision undermines rather than supports respondents' position. The Court in *Honda* in fact reaffirmed the established rule that in a suit against the sovereign, the statute of limitations may not be tolled without express congressional consent because such a provision is a condition on the waiver of sovereign immunity. 386 U.S. at 501. The Court found that settled rule inapplicable in *Honda* only because it was not a case in which "the public treasury was directly affected" (*ibid.*). *Honda* arose under the Trading with the Enemy Act and involved the return of seized enemy assets to United States creditors, "assets that

were never contemplated as finding their way permanently into the public fisc" (*ibid.*). In this case, by contrast, "the public treasury [is] directly affected" because respondents seek to recover money from the Trust Fund under Title II or appropriated funds under the SSI program. Principles of sovereign immunity—including the rule that conditions on Congress's waiver of that immunity may not be waived or extended by the courts in the absence of express congressional authorization—apply with particular force where a claim for money against the federal government is involved. See, *e.g.*, 5 U.S.C. 702; *Finn* v. *United States*, 123 U.S. 227, 232-233 (1887); *Munro* v. *United States*, 303 U.S. 36, 41 (1938); *Soriano* v. *United States*, 352 U.S. 270, 275-276 (1957).

Respondents' argument in favor of excusing the class members' failure to file suit within 60 days depends entirely on the premise that the Secretary engaged in acts of concealment. As we have explained, however, there is no evidence of any such affirmative concealment. See page 5, *supra*. Moreover, the notices the class members received expressly informed them that they had been found by the state agency not to be entitled to benefits because it was determined that they could work. See pages 7-8, *supra*. That notice unquestionably conveyed the essential information to the claimants involved. The notices also informed the recipients that they had 60 days within which to seek further review and that they could contact SSA for further information. See, *e.g.*, J.A. 61. Accordingly, no class member who thought he could not work and wished to challenge the state agency's contrary conclusion faced any impediment to doing so.[11]

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[11]Respondents argue (Br. 42-45) that the 60-day period did not begin to run because the notices of the state agency decisions did not comply with 42 U.S.C. 405(b)(1) and 1383(c)(1), which provide that the state agency's decision must contain a statement of the case, a discussion of the evidence, and the reasons on which it is based. This argument was not presented below and therefore is not properly before the Court. In any event, the state agency decisions in the record (cited at page 8, *supra*) did contain this information. Moreover, Sections 405(b)(1) and 1383(c)(1) are not addressed to the content of the Secretary's "final decision," which is rendered by the Appeals Council and triggers the claimant's right of judicial review. Under Section 405(g), the running of the 60-day period is triggered by the mailing of "notice" of that decision; accordingly, the contents of even the final decision have no bearing on the 60-day suit filing period.

Finally, respondents argue (Br. 36) that the Secretary waived the 60-day filing requirement because it was not specifically mentioned in the answer to the complaint. However, as we have pointed out (Gov't Br. 45 n.14), the answer did state that the court was without subject matter jurisdiction (J.A. 57), which encompassed the failure of any class members to comply with the prerequisites for invoking the jurisdiction of the district court. In any event, no objection is raised here to the timeliness of the action insofar as the named plaintiffs are concerned. The broadly disruptive impact of the decision below concerns the district court's exercise of jurisdiction over the claims of the unnamed class members. The class had been certified before the answer was filed (J.A. 2), and it already had been defined to include individuals whose claims had been denied more than three years before this suit was filed. However, Fed. R. Civ. P. 23(c)(1) provides that the class definition is subject to revision by the court at any time prior to the court's decision. In light of the explicit 60-day limitation Congress imposed on the bringing of actions under 42 U.S.C. 405(g)—and particularly in light of the jurisdictional nature of that limitation—the district court was obligated to modify the class definition to conform to the 60-day requirement whenever the defect in the initial certification was called to its attention.

CONCLUSION

For the foregoing reasons and the additional reasons stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

CHARLES FRIED
Solicitor General

FEBRUARY 1986

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
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No. 84-1923

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

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Petitioners,

v.

CITY OF NEW YORK, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE AMERICAN BAR ASSOCIATION, AMICUS CURIAE, IN SUPPORT OF THE RESPONDENTS

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BRIEF FOR THE AMERICAN BAR ASSOCIATION, AMICUS CURIAE, IN SUPPORT OF THE RESPONDENTS

INTEREST OF AMICUS

Counsel for the parties have consented to the filing of this *amicus* brief by the American Bar Association ("ABA") in support of the respondents.

The ABA is the world's largest voluntary professional association, with over 320,000 members. As the representative of the legal professional in the United States, the ABA is vitally concerned with the administration of justice and the implementation of our ideal of equal justice under law. The stated goals of the ABA thus include

promoting "Improvements in the American System of Justice," improving the "Delivery of Legal Services" and advancing the "Rule of Law in the World."

In addition to its general concern for equal justice for all persons, the ABA has been especially concerned for those segments of our population—the elderly and the mentally disabled—that are generally least able to protect their rights. To consider and address the problems of these two groups, the ABA has established two special commissions with membership drawn, not just from the the legal profession, but from other concerned professions and from distinguished lay leaders. These two Commissions are: the Commission on Legal Problems of the Elderly and the Commission on the Mentally Disabled. As part of their activities, these two Commissions follow developments in the social security and disability fields, work to protect the rights of the elderly and the mentally disabled, and make recommendations regarding programs for their benefit.

The ABA is interested in this case because, as the courts below found, the Social Security Administration ("SSA") for several years used an undisclosed and "systematic procedural irregularity" to terminate or deny the disability benefits of thousands of mentally ill persons, thereby causing them great harm. The Secretary of Health and Human Services, instead of proceeding to correct the harm done by exercising her authority to waive the exhaustion and timeliness requirements of 42 U.S.C. § 405(g) (1982), invokes those requirements to bar judicial relief.[1] The case accordingly implicates a variety of considerations of interest to the ABA such as: the pro-

[1] At the time of the proceedings below Mrs. Heckler was the Secretary. Subsequent to the filing of the petition and her brief on the merits she has been succeeded by Secretary Bowen. For consistency with the proceedings below and prior filings in this Court we will continue to use the feminine in referring to the Secretary.

tection of the rights of the mentally disabled; the integrity of the administrative process and the observance of lawful procedures by administrative agencies; the role of the courts in seeing that agencies act within the bounds of law; the avoidance of unnecessary and wasteful use of scarce judicial and administrative resources; and the proper balance to be struck between the need for administrative finality and access to justice in the courts.

The ABA, as the representative of the nation's legal profession, believes it can offer some independent perspectives on these matters which will help strike a proper balance between the Secretary's administrative needs and the rights of the beneficiaries of the social security system.[2]

SUMMARY OF ARGUMENT

The exhaustion and 60 day requirements of 42 U.S.C. 405(g) are reasonable and necessary, but not absolute, requirements. They can be waived by the Secretary, and they can be excused by the courts in those rare situations where that is necessary to achieve the remedial purposes of the Social Security Act and to protect the integrity of the administrative process. This case presents such a rare situation.

A. Statutory requirements for exhaustion of administrative remedies such as § 405(g) are to be applied both with regard for the administrative scheme at issue and with regard for the purposes to be served by exhaustion. *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975). Accordingly in "certain special cases" exhaustion may be judicially excused. *Heckler v. Ringer*, 104 S.Ct. 2013, 2023 (1984); *Mathews v. Eldridge*, 424 U.S. 319, 330-31 (1976).

[2] The interest of the ABA is limited to the exhaustion and timeliness requirements of 42 U.S.C. § 405(g) which are the subject of the first two questions presented by the petitioners. We take no position on, and do not discuss, the third question which relates to the availability of mandamus jurisdiction.

This is such a "special" case because the SSA over a period of several years used an undisclosed and "systematic procedural irregularity," contrary to the Social Security Act and the governing regulations, to deny the disability claims of thousands of mentally disabled persons, thereby causing them severe and irreparable injury. Requiring exhaustion in these circumstances—where neither the claimants nor the upper echelons of administrative review were aware of the illegal practice—would frustrate the beneficial purposes of the Social Security Act, would be futile, and would not serve any of the purposes of the exhaustion doctrine. In particular, exhaustion would not have allowed the agency to correct its errors, for the improper practice was not disclosed to the claimants or to the administrative law judges and in fact was ended only by litigation, not by administrative exhaustion. If the thousands of claimants, who failed to exhaust their administrative remedies by challenging the improper practice of which they were unaware, are excluded from the certified class, the result would simply be to insulate improper agency action and leave uncorrected the harm done by that action to the most vulnerable segment of our society, the mentally disabled. The exhaustion doctrine is sufficiently flexible to prevent such manifest injustice. It is to be "interpreted pragmatically". It should be so interpreted here to excuse exhaustion, because the claimants are not really seeking to avoid the administrative process. They simply want it to work properly, freed of the improper practice that denied their benefit claims.

B. The 60 day requirement for seeking judicial review is a "statute of limitations." *Weinberger v. Salfi*, 422 U.S. 749, 763-64 (1975); *Mathews v. Eldridge*, 424 U.S. 319, 328 n.9 (1976). As such, it is "waivable by the parties," and it can also be tolled on traditional equitable grounds several of which are present here. The claimants were not aware of the "systematic procedural irregularity" used to deny their benefits. In letting their time to appeal expire, they "were entitled to believe that their Government's determination of ineligibility was the considered judgment of an agency faithfully executing the laws of the United States" (Pet. App. 18a).[2] Tolling was accordingly justified: because the SSA's conduct had the same effect as fraudulent concealment, *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); because SSA's affirmative misconduct lulled the claimants into inaction, *Baldwin County Welcome Center v. Brown*, 104 S.Ct. 1723, 1726 (1984); *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232-33 (1959); and because inadequate notice was given since SSA did not disclose the actual and improper grounds for denial of the benefit claims. *Baldwin County Welcome Center*, 104 S.Ct. at 1725.

The case for tolling is further reinforced by the mentally impaired condition of the claimants who, because of their disability, are particularly vulnerable to bureaucratic error and should be given every equitable consideration.

ARGUMENT

The Secretary has an enormous task in administering the massive social security system. The exhaustion and 60 day requirements of 42 U.S.C. § 405(g) are intended to help manage that task. As such, they are for most situations reasonable and necessary requirements, but neither the statute nor its judicial interpretation contemplates that they be absolute requirements. They can be waived by the Secretary. They can also be tolled by the courts in those rare situations where that is needed to achieve the broad remedial purposes of the Social Security Act and to protect the integrity of the administrative process itself by insuring administration of the Act that is not only efficient and effective but also proper and fair. Such a rare situation is presented by this case.

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[2] This and similar references are to the appendices to the petition for certiorari which contain the opinions of the district court and the court of appeals.

I. The Requirement for Exhaustion of Administrative Remedies Was Properly Excused.

The courts below followed and correctly applied the principles established by this Court for determining when compliance with the exhaustion requirement of § 405(g) can be judicially excused.

A. *The Relevant Principles Established by This Court.*

Statutory requirements for exhaustion of administrative remedies, such as § 205(g) of the Social Security Act, 42 U.S.C. § 405(g), are to be applied both with "regard for the particular administrative scheme at issue" and also with regard for the purposes to be served—namely, that exhaustion "is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975). Accordingly, the exhaustion requirement of § 405(g) can be waived by the Secretary "when she deems further exhaustion futile, . . ." Also "in certain special cases, deference to the Secretary's conclusion as to the utility of pursuing the claim through administrative channels is not always appropriate." *Heckler v. Ringer*, 104 S.Ct. 2013, 2023 (1984).[4]

This Court has identified two categories of such "special" cases, where exhaustion may be judicially excused even over the Secretary's objection:

[4] As *Ringer* explains, the exhaustion requirement of § 405(g) has two components: a "nonwaivable requirement" that a claim be presented to the Secretary and "a waivable requirement that the administrative remedies prescribed by the Secretary be pursued fully by the claimant." 104 S. Ct. at 2023. Only the waivable exhaustion requirement is in issue here. The Secretary has not raised any question regarding the holding below that the nonwaivable presentment requirement had been satisfied in this case.

1. One category, which is not involved here, is relatively uncomplicated and easy to apply. Thus, exhaustion may be excused when the "only issue is the constitutionality of a statutory requirement, a matter beyond his [the Secretary's] jurisdiction to determine, and . . . the claim is neither otherwise invalid nor cognizable under a different section of the Act." *Salfi*, 422 U.S. at 765; *Mathews v. Diaz*, 426 U.S. 67, 75-77 (1976).[5]

2. The other category, which is involved here, is more complex and judgmental. Exhaustion may be excused "where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976). As the quoted language indicates, this test requires courts to consider relevant factors and strike a balance between the administrative needs of the Secretary, the desirability of finality, and fundamental fairness to the beneficiaries of the social security system. *Eldridge* identified a number of such relevant factors without naming any one factor as paramount or essential. The "nature of the claim being asserted and the consequences of deferment of judicial review" were described as "important factors." Also, as a "core principle . . . statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered." In excusing exhaustion, the Court noted that

[5] This category is involved in *Bowen v. Owens, et al.* pending as No. 84-1905. In that case the district court held that exhaustion was excused because it would be futile and a waste of resources to require administrative exhaustion pending resolution of the constitutional challenge raised in that case. As the district court and other courts have noted in such circumstances, there will be no need to exhaust administrative remedies if the challenge should be rejected; and, if it should be sustained, any questions can be resolved on remand to the agency. *See* the opinion of the district court in *Owens* at pp. 16a-19a of Appendix B to the jurisdictional statement and cases there cited.

Eldridge's challenge was "entirely collateral" to his substantive claim of entitlement, that "full relief" could not be obtained later, and that Eldridge had "raised at least a colorable claim" that "an erroneous termination" would irreparably injure him. 424 U.S. at 330-31.

Another important factor is whether exhaustion would be futile. *Heckler v. Ringer*, 104 S.Ct. at 2023-24. Thus exhaustion may be judicially excused when pursuit would be futile because the Secretary "has already taken a firm position on the issue" so that the right being asserted cannot "be vindicated in the administrative process." *Heckler v. Lopez*, 464 U.S. 879, 883 (1983) (Stevens, J., dissenting). In that situation there is no administrative "remedy" to pursue; exhaustion would be futile and a waste of scarce administrative resources to no purpose. *Cf. Salfi*, 422 U.S. at 765-66.

B. *The Courts Below Correctly Applied the Relevant Principles.*

In this case the courts below concluded that exhaustion was not required under the principles established by this Court. The only other circuit to consider the same situation had previously reached the same result in *Mental Health Ass'n of Minnesota v. Heckler*, 720 F.2d 965 (8th Cir. 1983). We submit that this result was correct, given the nature of the case, the consequences of denying judicial review, and the futility of requiring exhaustion.

As the Secretary states: "The merits of the dispute are not at issue here."[6] Indeed, the merits are conceded for, as the court of appeals noted, the Secretary "made no claim before the District Court or on appeal" that the presumption used to deny disability benefits "was lawful". There "is thus no dispute that on the merits the class members are entitled to prevail." (Pet. App. 21a). What is in issue is whether each of the thousands of mentally

[6] Brief for the petitioners ("Sec. Br."), p. 2.

disabled persons in the class certified below[7] must have satisfied the exhaustion and timeliness requirements of 42 U.S.C. § 405(g) in order to obtain judicial relief from the improper procedures used by SSA to adjudicate their benefit claims—as the Secretary contends—or whether these requirements can be excused—as the courts below held.

In order to resolve that issue it is necessary to consider what happened in this case. From the opinions of the district court (Pet. App. 30a-63a) and the court of appeals (Pet. App. 1a-23a) it is understandable why the Secretary does not attempt to defend on the merits. As those opinions show:

1. The Social Security Act and the governing regulations provide, *inter alia*, for payments to mentally ill persons who are disabled from working. The procedure for determining whether a claimant is incapable of engaging in "substantial gainful activity" first requires determination whether the impairment is "severe." After that, if such an impairment does not come within a list of impairments conclusively presumed to be disabling, an assessment is to be made of the person's "residual functional capacity" to engage in basic work activity.

2. Although this assessment calls for an individual evaluation of the mental and physical conditions of each claimant, the SSA, informally and without disclosure to the public, determined in 1980 that claimants whose impairments were not bad enough for inclusion in the list were presumed, usually conclusively, to be able to work. This was disclosed to the state agencies which make the initial decisions on disability claims by frequent reversal of their awards of benefits, as well as by internal unpublished memoranda circulated within SSA.

3. By using this "systematic procedural irregularity" and "pressuring" the state agencies, instead of complying

[7] The certified class is defined at Pet. App. 65a.

with the requirements of the statute and regulations for individual assessments of residual functional capacity,[8] the SSA illegally caused thousands of mentally ill persons to lose their disability benefits. The resulting benefit terminations and denials caused great and irreparable injury. The very disability of the beneficiaries involved—their severe mental illnesses—not only intensified the irreparable harm they suffered, but also made it practically impossible for them to protect their rights. Even if they had been able to pursue their administrative remedies before the administrative law judges ("ALJs"), that would have been futile, for the policy was both fixed and not known to either the claimants or the ALJs.

4. The SSA eventually abandoned the illegal practice but, as the district court noted, "only after the filing of this lawsuit and after a preliminary injunction was issued on December 22, 1982, in the case of *Mental Health Association of Minnesota v. Schweiker*, 554 F. Supp. 157 (D. Minn. 1982), *aff'd*, 720 F.2d 965 (8th Cir. 1983)." (Pet. App. 39a). Like the courts below, the Eighth Circuit held that the practice was illegal and also that exhaustion was not required of each class member.

The findings of the district court to the foregoing effect, which the Second Circuit accepted as based on "ample evidence" (Pet. App. 14a), are explicit and compelling and show why exhaustion should be excused under the principles established by this Court:

> —Exhaustion "would have been futile in challenging the Secretary's backdoor policy." (Pet. App. 44a). The use of the illegal presumption was unknown to the claimants (and their attorneys or other representatives, if any) since it was "covert," "clandestine" and "sub rosa." (Pet. App. 39a-42a).

[8] 42 U.S.C. §§ 423(d)(2)(A) (Supp. I 1983), 1382c(a)(3)(B) (1982); 20 C.F.R. §§ 404.1520, 416.920 (1985); *Heckler v. Campbell*, 461 U.S. 458, 467 (1983).

Accordingly, the claims could not benefit "from further factual development and refinement through the administrative process" because the class members could not attack the "illegal procedure" that they did not know "existed" and because even "the administrative judges were unaware" of that illegal procedure. (Pet App. 45a). The ALJs "routinely give great weight to the finding" of the state agency; had they known of the illegal procedure "the results in many cases might well have been different." (Pet. App. 62a).

> —The denial of benefits resulting from using the illegal presumption was "particularly tragic in the instant case because of its devastating effect on thousands of mentally ill persons whose very disability prevented them from effectively confronting the system." (Pet. App. 31a).
>
> —"The mentally ill are particularly vulnerable to bureaucratic errors. . . . Even with help . . ., many do not appeal denials or terminations." (Pet. App. 38a).
>
> —Erroneous denial or termination of benefits "to a mentally ill person means more than that he or she will no longer receive benefits. To many it may mean a severe medical setback. . . . Some slip into acute paranoia while others become suicidal." (Pet. App. 38a).
>
> —The harm is accordingly "irreparable" and cannot be remedied by "interim benefits" or even by "ultimate success if they manage to pursue their appeals. . . . Because of their disability, many members of the class were incapable of challenging the bureaucracy." (Pet. App. 46a).

Understandably, the Secretary's brief tends to ignore these and other findings below and to discuss the desirability of administrative exhaustion in the abstract. That will not do. As previously noted, exhaustion requirements

are to be considered "with a regard for the particular administrative scheme at issue" and the purposes to be served, *Salfi*, 422 U.S. at 765. Also, "the nature of the claim being asserted and the consequences of deferment of judicial review are important factors in determining whether a statutory requirement of finality has been satisfied." *Eldridge*, 424 U.S. at 331, n.11.

When the Secretary does address the circumstances of this case, her arguments are neither responsive nor persuasive:

a. The Secretary stresses that SSA took "corrective" action. (Sec. Br. 10-11, 30). However, that action was taken only as a result of this case and the earlier litigation in the Eighth Circuit, not because of administrative review. More important, the "corrective" action simply halted continuance of the illegal practice for the future. It did nothing to "correct" the harmful consequences that had already resulted from the practice. Indeed, if the exhaustion requirements of § 405(g) are applied to exclude class members who did not pursue administrative appeals, the wrong done by the illegal practice will go uncorrected and may even be compounded. Those excluded members will not get whatever benefits were denied them during the several years the practice was followed. In addition, their very mental condition and the devastating effect of denial may have prevented them from reapplying for disability benefits or doing so in timely fashion.

b. The Secretary asserts that the initial determination was the "responsibility of the state agency" and that exhaustion was needed to afford the Secretary "her principal opportunity" to correct the "errors that might have been committed by the state agency." (Sec. Br. 31). This is disingenuous. The state agency, as the Secretary admits, is required to follow "regulations, guidelines, and performance standards established by the Secretary through SSA" (Sec. Br. 3). And, as the district court found, the state agency was under "pressure" to "con-

form to the line from Baltimore," the SSA headquarters (Pet. App. 36a, 39a-42a). The error was SSA's, and the state agency had to follow SSA's improper directions.

c. It is true that the unlawful practice was "not binding on the ALJs" (Sec. Br. 4-5, 31). But it is also true and more to the point that, as the district court found, the ALJs were not informed of the practice and were accordingly in no position to correct it (Pet. App. 45a, 62a). The same was true of the mentally disabled claimants and their attorneys. Accordingly they could not have brought the improper practice to the ALJs' attention even if they could have tried to exhaust their administrative remedies despite their impaired mental condition. The administrative record would not have disclosed that the initial determination by the state agency was based on the unpublished and improper instructions from SSA, rather than on a medical appraisal of the claimant's condition. Even an experienced attorney would have no reason to look for or discover such an unmentioned ground for the determination. To borrow from the old baseball axiom—"you can't hit what you can't see"—and you can't appeal from what you do not know happened. The undisclosed flaw in the administrative process would not have been exposed or corrected by administrative review. Accordingly, as the court of appeals concluded, exhaustion would have been futile "under the circumstances of this case" (Pet. App. 15a).

d. It is also true that some of the named plaintiffs had their claims decided administratively on grounds other than the unlawful presumption (Sec. Br. 32-33). But it does not follow that the same would have happened for the thousands of class members if they had taken administrative appeals. A similar argument was rejected by the Eighth Circuit in the *Minnesota Health* case where there was an 80% reversal rate for the approximately 40% of the class members who did exhaust their administrative appeals. In the court's view, "the high reversal

rate on appeal" simply confirmed the inadequacy of administrative review to remedy the harm done by the illegal practice. 720 F.2d at 970.

e. Finally, the Secretary speculates that many class members "simply abandoned their claims" and asserts that there are "no equitable considerations" justifying reopening "thousands of cases that were knowingly abandoned". (Sec. Br. 34). This speculation has no support in the record. Indeed, it simply ignores the mentally impaired condition of the claimants and the findings below that their "very disability prevented them from effectively confronting the system" and that even with help "many do not appeal denials or terminations" (Pet. App. 31a, 38a). For the Secretary to assert that these disadvantaged persons "knowingly abandoned" their benefit claims disregards reality and does not comport with the remedial purposes of the Social Security Act or the "orderly and sympathetic administration of the disability program" intended by Congress (see *Heckler v. Day*, 467 U.S. 104 (1984).

In sum, it is hard to imagine circumstances that more precisely fit the principles laid down by this Court for excusing the exhaustion requirement of 42 U.S.C. § 405 (g). Exhaustion would be futile and serve none of the purposes of the exhaustion doctrine as identified in *Salfi*, 422 U.S. at 765. In addition, the factors discussed in *Eldridge*, 424 U.S. at 330-31, for dispensing with exhaustion are present here. As the courts below found, the claimants had suffered "irreparable harm" and had a "colorable claim" that retroactive payments of benefits would not be fully compensatory. (Pet. App. 13a-14a). The only possible difference from *Eldridge* relates to how "collateral" the claimants' procedural challenges to SSA's improper instructions were to their benefit claims. The court of appeals concluded that the procedural claims were sufficiently collateral and also that no one factor, such as a "wholly collateral" claim, was critical to striking the

proper balance. (Pet. App. 13a-15a). That conclusion, we submit, was correct.

The claimants' challenge was collateral in the sense that the class "complains fundamentally of a procedural irregularity"; also, the district court "was not asked to and did not rule on the merits of any of the underlying claims" (Pet. App. 14a). Moreover, a "wholly collateral" claim does not appear to be a *sine qua non* for excusing exhaustion under this Court's decisions construing 42 U.S.C. § 405(g), nor should it be so held in the narrow circumstances of this case.

In *Ringer*, on which the Secretary principally relies for her argument that a "wholly collateral" claim is indispensable, the administrative process was not infected by the undisclosed and improper practice involved here. The decision in *Ringer* also rested on the fact that administrative exhaustion would not have been a futile exercise in that case. 104 S. Ct. at 2023-24. But exhaustion would have been futile in this case as the courts below found.[9]

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[9] The Secretary's insistence in this case on administrative exhaustion to deny a remedy for concededly unlawful conduct raises the same sorts of questions which Congressional committees, courts, commentators, and the ABA have voiced about the Secretary's policy of refusing to follow judicial precedents within a circuit with which she disagrees. Thus, as the House Ways and Means Committee said in 1984 in calling for an end to the nonacquiescence policy (H.R. Rep. No. 618, 98th Cong., 2d Sess. 25 (1984)):

> "The committee can find no reason grounded in sensible public policy to force beneficiaries to sue in order to obtain what has been declared by the Federal court as justice in a particular area. Such a policy creates a wholly undesirable distinction between those beneficiaries with the resources and fortitude to pursue their claims, and those who accept the government's original denial in good faith or because they lack the means to appeal their case. The strength of the social security program has always rested on the public perception that the agency's mission is to provide benefits to all those entitled to them, without undue delay or bureaucratic barriers.

The Secretary also invokes the final judgment requirement of 28 U.S.C. § 1291 (1982) as support for her argument that a "wholly collateral" claim is essential to excuse administrative exhaustion. This argument fails because there are significant differences between the final judgment requirement of 28 U.S.C. § 1291 and statutory exhaustion requirements like 42 U.S.C. § 405(g). The collateral exception doctrine applies to each, but that doctrine does not mark the only exception to statutory requirements for administrative exhaustion. Section 1291 deals with relations within the judiciary and one "vital purpose" of its final judgment rule is "maintaining the appropriate relation between the respective courts. . . ." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). Section 405(g), on the other hand, deals with relations between the courts and administrative agencies and the oversight role of the courts in seeing that agencies operate within the bounds of law. It is thus more flex-

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> The increasingly adversarial character of the process for becoming eligible for disability benefits, and especially for retaining eligibility, does immeasurable harm to the public's trust in the social security program and in government as a whole."

The same criticisms can be leveled at the Secretary's position in this case where she would limit relief to those few claimants who somehow, despite their mental disability, managed to pursue administrative appeals. Particularly tragic is the effect on those claimants who did not appeal because they accepted the denial of their claims as made in good faith, not knowing that the denials rested on improper grounds that the Secretary no longer defends.

For other critical discussions of the Secretary's nonacquiescence policy see Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 Colum. L. Rev. 582 (1985), and H.R. Conf. Rep. No. 1039, 98th Cong., 2d Sess. 36-38 (1984). It may be noted that the Secretary modified somewhat the rigors of her nonacquiescence policy in June, 1985. However, a month later, when the ABA considered and adopted resolutions opposing the nonacquiescence policy in July, 1985, it concluded that the policy as modified was subject to the same objections as the original policy and that both were contrary to the rule of law.

ible than the final judgment rule of § 1291. It is to be "interpreted pragmatically", *Bell v. New Jersey*, 461 U.S. 773, 779 (1983), and in accordance with the administrative scheme and the purposes to be served. *Salfi*, 422 U.S. at 765.

Such a pragmatic construction is called for here. Viewed realistically, the claimants are not seeking to dispense with administrative review; instead, they want their claims processed administratively in accordance with the requirements of the Social Security Act and the regulations, without the unlawful practice which caused the denial of their benefits. That is the relief they sought and were granted below—that their cases "be reopened and redetermined by the Secretary using proper standards" with the "usual administrative appeal rights" to follow (Pet. App. 65a-66a). The principle of administrative exhaustion should be flexible enough to permit such a corrective purging of the administrative process when the process is unable to correct itself.

As the Court has said many times and many ways: "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States*, 318 U.S. 332, 347 (1943). Just as federal courts must maintain "civilized standards of procedure" in supervising the administration of federal criminal justice (*id.* at 340), so must they protect the integrity of the federal administrative process. Judicial review should be available where "there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error 'going to the heart of the administrative determination.'" [10] That is what has happened here. Like the Attorney General in *Accardi v. Shaughnessy*, 347 U.S. 260 (1954), the SSA here improperly "pressured" the state agency, instead of letting it use its discretion in

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[10] *Lindahl v. OPM*, 105 S. Ct. 1620, 1633 (1985) (quoting from *Scroggins v. United States*, 184 Ct.Cl. at 534, 397 F.2d at 297).

accordance with the governing regulations. In so doing the SSA also violated the requirement that it follow its own regulations, as well as the governing statute. *Vitarelli v. Seaton*, 359 U.S. 535 (1959). Such a perversion of the administrative process should not be insulated from judicial review by the principles of administrative exhaustion.

Administrative exhaustion is a reasonable and necessary requirement, but it should not operate to permit such manifest injustice and to frustrate the beneficial purposes of the Social Security Act by closing the courts to these mentally ill claimants and turning the disability benefit system into an adversarial trap in which the intended beneficiaries become the victims.

II. The 60 Day Requirement Was Properly Tolled.

A. *The 60 Day Requirement Is a Statute of Limitations.*

In addition to requiring exhaustion of administrative remedies, 42 U.S.C. § 405(g) also specifies that an action for judicial review of a final decision of the Secretary is to be "commenced within sixty days after the mailing to [the claimant] of notice of such decision or within such further time as the Secretary may allow." The courts below held that this 60 day requirement was a statute of limitations subject to tolling and proceeded to toll it for the period that SSA's "clandestine policy" was used. We submit that this holding was correct.

In *Weinberger v. Salfi*, 422 U.S. 749 (1975), and *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court stated that the 60 day provision is a "statute of limitations" and, as such, is "waivable by the parties." In both cases, the Court ruled that the Secretary waived the issue of timeliness because he did not timely raise it below. 422 U.S. at 763-64; 424 U.S. at 328 n.9. The Secretary attacks these conclusions as dicta, but the plain language of the statute supports them. 42 U.S.C. § 405(g) gives the Secretary discretion to waive the time

limit. The fact that the administrator may relax the time limit for equitable reasons indicates that the provision is not a jurisdictional limit on judicial power. If an agency could exercise discretion over *jurisdictional* time limits, it would be able to determine when a federal court would have jurisdiction. Such authority would be inappropriate in our constitutional scheme. *See, e.g., Eastland v. Tennessee Valley Authority*, 553 F.2d 364, 369 (5th Cir.), *cert. denied*, 434 U.S. 985 (1977). In contrast, it is appropriate for agencies to exercise discretion over time limits which are statutes of limitation. *See, e.g., Allen v. United States*, 542 F.2d 176, 180 (3d Cir. 1976).

The statutory scheme also strongly suggests that the 60 day provision is a statute of limitations, rather than an inflexible jurisdictional barrier. Like the other finality requirement in § 405(g)—the requirement for exhaustion of administrative remedies—the 60 day requirement should be construed in a manner that gives due regard to the statutory purpose (*Salfi*, 422 U.S. at 765), and is consistent with "the core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered . . . ." *Eldridge*, 424 U.S. at 331, n.11.

Thus from various standpoints the 60 day requirement emerges—not as an absolute jurisdictional time limit—but as a statute of limitations that should be construed with some flexibility when necessary to insure the orderly administration of the social security system and the effectuation of its broadly remedial program of benefits for the elderly and the disabled.[11]

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[11] The benefits scheme established in the Social Security Act is analogous to Title VII of the Civil Rights Act of 1964, which is designed to remedy the social wrongs associated with invidious discrimination. Congress extended Title VII protection to federal employees in 1972. Like the Social Security Act, Title VII requires

The Secretary argues that under sovereign immunity principles the 60 day requirement is an absolute jurisdictional requirement. That argument is wrong. Sovereign immunity is not involved in the instant case. It is not brought against the sovereign seeking its funds. It is brought against the Secretary by the beneficiaries of an entitlements system which is supported by trust and appropriated funds.[12] Moreover, sovereign immunity would not bar this suit which charges that the agency acted illegally. Suits against government officers charged with acting contrary to their statutory authority or pursuant to an unconstitutional statute, are not barred by sovereign immunity. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-90 (1949); *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963).[13]

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initial handling of claims by an administrative agency; claimants must then seek judicial review within 30 days. 42 U.S.C. § 2000e-16(c) (1982). Although the government is the defendant in suits brought under this provision, some courts have construed the time limit on judicial review as a statute of limitations. *See, e.g., Allen v. United States*, 542 F.2d 176 (3d Cir. 1976), with which compare *Eastland v. Tennessee Valley Authority*, 553 F.2d 364 (5th Cir. 1977), holding the time limit jurisdictional.

[12] This case involves claims for disability benefits under Title II of the Social Security Act which are payable out of the Federal Disability Insurance Trust Fund and under the Supplemental Security Income program established by Title XVI of the Act which are payable out of appropriated funds (*see Heckler v. Day*, 467 U.S. 104 (1984); 42 U.S.C.A. §§ 401 (West 1985), 42 U.S.C. § 1381 (1982)). Suits for such benefits do not raise questions of sovereign immunity. *Cf. Train v. City of New York*, 420 U.S. 35, 41 n.7 (1975); *Springdale Convalescent Center v. Mathews*, 545 F.2d 943, 950-51 (5th Cir. 1977); *National Council of Community Mental Health Centers, Inc. v. Weinberger*, 361 F. Supp. 897 (D.D.C. 1973).

[13] Likewise inapposite is the Secretary's citation of cases for contract damages or just compensation brought against the United States in the Court of Claims such as *Finn v. United States*, 123 U.S. 227 (1887), and *Soriano v. United States*, 352 U.S. 270 (1957). Those were suits against the sovereign and the time limits specified in the consent to be sued had no provision for extension. There were no claims of *ultra vires* or unconstitutional action. The circumstances are totally different here as appears from the text above.

As a statute of limitations the 60 day provision is not only waivable by the parties; it is also subject to tolling for traditional equitable reasons recognized by the Court. One is the "maxim that no man can take advantage of his own wrong" which "has frequently been employed to bar inequitable reliance on statutes of limitations." *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232-33 (1959). Another is the old chancery rule of fraudulent concealment which "this Court long ago adopted as its own" and reads "into every federal statute of limitation." *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). Other equitable grounds for tolling, discussed in *Baldwin County Welcome Center v. Brown*, 104 S. Ct. 1723, 1725-26 (1984), include "inadequate notice" to a claimant (citing *Gates v. Georgia-Pacific Corp.*, 492 F.2d 292 (9th Cir. 1974)), and "affirmative misconduct on the part of a defendant [which] lulled the plaintiff into inaction" (citing *Villasenor v. Lockheed Aircraft Corp.*, 640 F.2d 207 (9th Cir. 1981); *Wilkerson v. Siegfried Ins. Agency, Inc.*, 621 F.2d 1042 (10th Cir. 1980); *Leake v. University of Cincinnati*, 605 F.2d 255 (6th Cir. 1979)).

B. *Tolling Was Appropriate in This Case.*

Tolling of the 60 day requirement in this case—where SSA used an undisclosed "systematic procedural irregularity" to terminate or deny benefits to thousands of mentally disabled claimants—was appropriate for the various equitable grounds just discussed which overlap and reinforce each other.

Thus, what happened here had the same effect as fraudulent concealment which is "read into every federal statute of limitation." *Holmberg*, 327 U.S. at 397. As the district court found, the SSA's improper practice was "covert," "clandestine," "sub rosa," and "secret" so far

as the claimants were concerned; this "covert policy" was followed consistently, and "[e]vidence of the fixed clandestine policy against those with mental illness is overwhelming.' (Pet. App. 39a-42a). Accordingly, as the court of appeals said, the 60 day requirement was appropriately tolled because the SSA's "secretive conduct" prevented the class members from knowing of the violation of their rights which had resulted in denial of their benefits. (Pet. App. 18a).

It is no answer for the Secretary to assert that there was no "sinister practice or active concealment" and that the practice was reflected in "ordinary communications in the normal course of agency business" of which the state agency making the initial determination "had full knowledge" (Sec. Br. 48). This contention is inconsistent with the foregoing findings of the courts below. It is also beside the point. As the court of appeals emphasized, the improper practice was not disclosed to the claimants who let their administrative and judicial remedies expire in the belief "that their Government's determination of ineligibility was the considered judgment of an agency faithfully executing the laws of the United States." (Pet. App. 18a).

Even if the government's action was not strictly fraudulent concealment, it is clear from the foregoing that SSA's conduct lulled the claimants into inaction. The claimants, even if they could have surmounted the problems of their mental disability, simply had no reason to know that their claims had not been considered according to the requirements of the Social Security Act and the published regulations. Tolling was accordingly appropriate because of SSA's misconduct. *Glus*, 359 U.S. at 232-33; *Baldwin County Welcome Center*, 104 S. Ct. at 1726.

Tolling was further justified because the notices were inadequate and violated statutory and due process requirements by failing to disclose the actual (and improper) reason for denial of the disability benefit claims. The Social Security Act requires that an unfavorable disability determination contain statements "in understandable language" discussing the evidence and stating "the reason or reasons upon which it is based." 42 U.S.C. §§ 405(b)(1) (Supp. I 1983), 1383(c)(1) (1982). Similarly, due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties . . . and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). The inadequate and defective notices in this case, which failed "to convey the required information" (*id.*), tolled the statute. *Baldwin County Welcome Center*, 104 S. Ct. at 1725. Indeed, even if the statute were jurisdictional, it is arguable that the nondisclosure tolled the 60 day period as the court of appeals noted (Pet. App. 18a, n.6).

In considering the equitable case for tolling it is also appropriate to note the vulnerability of these mentally ill claimants. As the district court emphasized (Pet. App. 38a):

> "The mentally ill are particularly vulnerable to bureaucratic errors. Some do not even understand the communications they receive from SSA. Others are afraid of the system. Even with help from social workers and others, many do not appeal denials or terminations."
>
> "An erroneous termination or denial of benefits to a mentally ill person means more than that he or she will no longer receive benefits. To many it may mean a severe medical setback."

These mentally ill claimants should be given every equitable consideration in the protection of the rights they are unable to protect themselves.[14]

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[14] The claimants are at a minimum entitled to the same liberal treatment that the Secretary claims for herself. The Secretary specifically raised the timeliness issue for the first time in her post trial brief. The district court noted that "[t]his is rather

Finally, the circumstances of this case belie the Secretary's contention that the decision of the court of appeals will permit tolling whenever an interpretation of regulations contained in internal operating instructions "later turns out to have been erroneous" (Sec. Br. 46). This contention cannot be squared with what happened here as found by the courts below. The particular facts of this case, which justify tolling, will not result in the parade of horribles that the Secretary tries to suggest. The tolling ordered here will simply relieve class members of the horror that has been visited on them by improper denial of their mental disability benefits.

CONCLUSION

For the reasons stated in this brief and the brief of the respondents, the decision of the court of appeals should be affirmed in so far as it tolls the exhaustion and 60 day requirements of 42 U.S.C. § 405(g).

Respectfully submitted,

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late." (Pet. App. 59a). In her appellate brief, the Secretary urged the Second Circuit to consider the defense because no prejudice resulted from the timing of its submission. *Brief for the Appellants* at 18. Injecting equitable considerations into the question of her own timeliness, the Secretary claimed that the defense was valid. The Secretary also argued on appeal that the standard defense of lack of subject matter jurisdiction, included in her answer, was sufficient to raise the timeliness issue. This argument depends upon her contention that the 60 day provision is jurisdictional, *id.*, a contention which we submit is erroneous for the reasons stated in II-A, *supra*.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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No. 84-1923

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

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Petitioners,

v.

CITY OF NEW YORK, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE AMERICAN PSYCHIATRIC ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Social Security disability claimants, whose benefits were denied or terminated because of a covert policy under which the Secretary directed initial decision-makers to follow a rule in direct conflict with the Social Security Act and the Secretary's own regulations, can challenge that policy under 42 U.S.C. § 405(g) on the basis of rights collateral to any claim for benefits without exhausting their administrative remedies.

2. Whether the sixty-day time limitation for seeking judicial review under 42 U.S.C. § 405(g) began to run before claimants were given notice of the reasons that their benefits were denied or terminated.

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Mitchell v. Forsyth, 105 S. Ct. 2805 (1985) 12, 14, 15
Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) 13
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Staub v. City of Baxley, 355 U.S. 313 (1958) 15
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Social Security Reviews of the Mentally Disabled: Hearings Before the Senate Special Comm. on Aging, 98th Cong., 1st Sess. (1983) — 19, 24, 25, 26

S. Rep. No. 408, 96th Cong., 1st Sess. (1979), *reprinted in* 1980 U.S. Code Cong. & Ad. News 1277 — 21

OTHER AUTHORITIES

Anderson, *Social Security and SSI Benefits for the Mentally Disabled*, 33 Hosp. & Community Psychiatry 295 (1982) — 27

Berg & Hammitt, *Assessing the Psychiatric Patient's Ability to Meet the Literacy Demands of Hospitalization*, 31 Hosp. & Community Psychiatry 266 (1980) — 27

Coles, Roth & Pollack, *Literacy Skills of Long-Term Hospitalized Mental Patients*, 29 Hosp. Community Psychiatry 512 (1978) — 27

Ingall, *Determining Eligibility of Patients for SSI Payments: The Psychiatrist's Role*, 33 Hosp. & Community Psychiatry 851 (1982) — 24, 25

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L. Jaffe, *Judicial Control of Administrative Action*, 426-29 (1965)	13
Mental Health Rep. (Capitol Publications, Inc.) No. 11 (May 25, 1983)	26
Munetz & Roth, *Helping Chronic Patients Understand Agency Communications*, 33 Hosp. & Community Psychiatry 151 (1982)	25, 27
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BRIEF FOR THE AMERICAN PSYCHIATRIC ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF AMICUS CURIAE

The American Psychiatric Association ("APA"), founded in 1844, is the nation's largest organization of physicians who specialize in psychiatry. More than 32,000 of the nation's 40,000 psychiatrists are members. The APA has participated as amicus curiae in numerous Supreme Court cases involving mental health issues, including *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S. Ct. 2380 (1985); *Connecticut Department of Income Maintenance v. Heckler*, 105 S. Ct. 2210 (1985); *Mills*

v. Rogers, 457 U.S. 291 (1981); *Parham v. J.R.*, 442 U.S. 584 (1979); and *Addington v. Texas*, 441 U.S. 418 (1979).

The APA and its members have been actively involved in the process by which the Secretary of Health and Human Services determines whether mentally ill persons are eligible for Social Security benefits. On the one hand, the APA has advised both Congress and the Secretary concerning the standards and procedures that should be used in benefits determinations. On the other hand, many of the APA's members participate in the process through the treatment and evaluation of disability applicants. The Association believes that the resolution of the instant case will have an important effect on many severely mentally ill and disabled persons. It also believes that, through its continuing involvement in this field, it has developed information that can assist the Court in resolving this case.

The parties have agreed to filing of this brief Amicus Curiae, and their letters of consent have been lodged with the Clerk.

STATEMENT OF THE CASE

Respondents brought this class action to challenge a policy by which the Secretary denied or terminated disability benefits under Titles II and XVI of the Social Security Act for unstated reasons flatly at odds with the Act and its regulations. The Secretary has never argued that his actions were legal. Instead, he contends that the district court lacked the authority to address respondents' claims because class members failed 1) to exhaust their administrative remedies as required by 42 U.S.C. § 405(g), and 2) to seek further judicial review within the sixty-day time period prescribed by section 405(g) and the regulations.

While the impropriety of the Secretary's policy is uncontested, the jurisdictional questions presented necessarily require the Court to examine the nature of respondents' claims on the merits. The challenged policy involves the five-step evaluation process that the Secretary has promulgated to determine whether individuals are eligible for disability benefits.[1] If a claimant is found to be unemployed, 20 C.F.R. §§ 404.1520(b), 416.920(b), the Secretary must then determine whether the claimant has a severe mental impairment, *id.* §§ 404.1520(c), .1521, 416.920(c), .921. If so, the claimant is entitled to benefits if he is found to have an impairment that meets or exceeds one of the listed impairments outlined in the regulations. *Id.* §§ 404.1520(d), 416.920(d).[2] The regulations go on to state that a claimant without a listed impairment is nevertheless entitled to benefits if, on the basis of the claimant's residual functional capacity, *id.* §§ 404.1545(c), 416.945(c), it is determined that he cannot perform work available in the national economy, *id.* §§ 404.1520(e), (f), 416.920(e), (f).

The class—made up of New York residents who were found to have mental impairments that are severe but were nevertheless denied disability benefits on the ground

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[1] The Secretary's regulations implement the statutory obligation to pay disability benefits to any individual who has a "medically determinable . . . mental impairment" that is "of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. §§ 423(d)(1)(A), (2)(A), 1382c(a)(3)(A), (B).

[2] More specifically, the regulations list categories of mental impairments that define per se disability, such as chronic brain syndromes and functional psychotic disorder. Under each of these categories is a two-prong standard to satisfy the listing: A) conditions, symptoms and signs; and B) restrictions in daily functions. For example, a claimant would satisfy the listing for functional psychotic disorder if he: A) "[m]anifested persistence of . . . [h]allucinations or delusions" and B) suffered "[r]esulting persistence of marked restrictions of daily activities and restriction of interests and seriously impaired ability to relate to other people." 20 C.F.R. § 404, Subpart P, Appendix I, § 12.03.

that they were capable of substantial gainful activity[3]—joined by the State of New York and the City of New York, claimed that the Secretary had secretly instructed the initial decisionmakers in the administrative process to deny or terminate benefits to claimants who had no per se impairment, in violation of the Due Process Clause, the statute, and the regulations.[4] That is to say, the complaint charged that the Secretary instructed the initial decisionmakers to deny or terminate benefits without performing the final steps of the evaluation required by the regulations concerning residual functional capacity and the availability of work in the national economy, and to do so without telling the claimants that they were following such a procedure. The relief sought was an open and fair evaluation for class members, conducted at the initial level in accordance with the governing regulations.

The district court held that it had the power to remedy the effects of the Secretary's illegal policy. Pet. App. 62a-63a. In reaching this conclusion, the court specifically found that the initial decisionmakers were directed by the Secretary to presume that those claimants who

[3] The class covered those who had applied for or received benefits on or after April 1, 1980.

[4] The Social Security Act and the Secretary's regulations outline a multistage administrative review process. The initial determination is made by a state agency under contract with and the direction of the Secretary. 42 U.S.C. §§ 421(a), 1383b(a); 20 C.F.R. §§ 404.1503, 416.903. In addition, a claimant can seek de novo reconsideration of an adverse decision by the state agency. 20 C.F.R. § 404.905, .907-.921, 416.1405, .1407-.1421. At the same time, the Secretary can review any decision on his own motion, 42 U.S.C. § 421(c)(1), and there are two levels of quality assurance review of a cross section of the state agency decisions by the Social Security Administration ("SSA"), *id.* § 121(c)(2), (3).

The claimant can also dispute the state agency's finding by seeking de novo review before an Administrative Law Judge ("ALJ"). 42 U.S.C. § 421(d). If that decision is adverse, the claimant can seek further review before the Appeal Council in the SSA. 20 C.F.R. §§ 404.967-.983, 416.1467-.1483. Finally, § 405(g) provides for judicial review of a "final decision" by the Secretary.

were not per se impaired automatically had the residual functional capacity to perform unskilled labor. Pet. App. 38a-41a. It also determined that this policy had been followed for approximately five years and that throughout that time claimants "as well as counsel, social workers and advisers . . . were unaware of its existence." Pet. App. 39a.

In addition, the court described the injuries suffered by class members as a result of the Secretary's policy. Relying on expert testimony, the court first stated that "[t]he mentally ill are particularly vulnerable to bureaucratic errors. Some do not even understand the communications they receive from SSA. Others are afraid of the system. Even with the help of social workers and others, many do not appeal denials or terminations." Pet. App. 38a. Second, it found that the denial or termination itself has a devastating effect on the mentally disabled: "An erroneous termination or denial of benefits to a mentally ill person means more than that he or she will no longer receive benefits. To many it may mean a severe medical setback. . . . Some slip into acute paranoia while others become suicidal." Pet. App. 38a.

Turning next to the Secretary's jurisdictional claims, the district court held that plaintiffs were challenging a final decision for the purposes of section 405(g). Relying on this Court's interpretation of the final decision requirement in *Mathews v. Eldridge*, 424 U.S. 319 (1976), as well as the Second Circuit's subsequent opinion in *Smith v. Schweiker*, 709 F.2d 777, 780 (2d Cir. 1983), the court found that plaintiffs' claims were "collateral to their claim for benefits," that "[e]xhaustion has been and would have been futile," and that requiring further administrative review would cause irreparable "[h]arm to members of the plaintiff class." Pet. App. 42a-45a. The court also held, in the alternative, that it had mandamus jurisdiction under 28 U.S.C. § 1361 over plaintiffs' claims. Pet. App. 46a-48a. In addition, the court

ruled that the sixty-day time limitation in section 405(g) was a statute of limitations that the Secretary had waived by failing to raise it in a timely manner. Pet. App. 59a-60a.[5]

Finally, the court addressed the merits of plaintiffs' claims.[6] It declined to reach their due process claim. Instead, it stated that the Secretary's policy "is contrary to the spirit and letter of the Social Security Act" and violative of "the requirements of [the Secretary's] own regulation." Pet. App. 60a-61a. As a remedy, the court ordered the Secretary to reopen the cases of class members and to have the initial decisionmakers redetermine their eligibility "using proper standards." Pet. App. 62a-63a.

On appeal, the Secretary principally argued that the court lacked jurisdiction under section 405(g). In pertinent part, the Second Circuit held that section 405(g)'s exhaustion requirement could be "waived" by the court on the basis of this Court's decisions in *Mathews v. Eldridge* and more recently in *Heckler v. Ringer*, 104 S. Ct. 2013 (1984). Pet. App. 12a-15a. The court interpreted *Mathews v. Eldridge* as turning on three factors: "futility, collaterality, and irreparable harm." Pet. App. 13a. While it agreed with the district court's finding on irreparable harm and futility, it also noted that:

> With respect to the nature of the plaintiffs' claims, it cannot be said, as was true in *Eldridge*, that these are "wholly" collateral to the claim for benefits;

[5] The district court also addressed whether the State and the City had standing. It held that the State and the City had standing for their own injuries and that the State could rely on *parens patriae* standing. Pet. App. 48a-58a.

[6] The court addressed the merits although the Second Circuit stated that "[t]he Secretary has made no claim before the District Court or on appeal that use of the presumption concerning residual functional capacity was lawful." Pet. App. 21a.

> plaintiffs' contention that the Secretary unlawfully failed individually to assess claimants' residual functional capacity is somewhat intertwined with claimants' demand for benefits.

Pet. App. 14a. The court, however, did not find this distinction to be critical in light of its "general approach, balancing the competing considerations to arrive at a just result under the circumstances presented." Pet. App. 13a.

The court of appeals also held that the sixty-day limitation did not bar plaintiffs' action. Pet. App. 15a-18a. It began by noting that this Court's rulings as to whether the sixty-day limitation is jurisdictional "is not free from doubt." Pet. App. 16a. In light of that conclusion, the court chose not to rely on the district court's holding that the Secretary waived this limitations claim by failing to raise it. Instead, it held that the time period was "tolled" during the time when the illegal policy "remained operative but undisclosed." Pet. App. 17a-18a. In the alternative, the court held that mandamus jurisdiction was available. Pet. App. 19a-20a.[7]

Thereafter, the merits panel of the court of appeals wrote a decision denying the Secretary's petition for rehearing and disagreeing with two arguments based on the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1974. First, the court held that the Reform Act's limited exception to the restrictions under section 405(g) could not be read as "an implied refusal to permit any other plaintiffs to proceed without strict compliance with section 405(g)."[8] Pet. App. 25a-

[7] The Secretary also argued in the Second Circuit that the district court's remedy was too broad. The court of appeals rejected the argument, and the Secretary has failed to raise it in this Court. Pet. App. 21a-23a.

[8] Section 2(a)(3) of the Reform Act, 98 Stat. at 1978, provides an exception from the requirements of § 405(g) for named members of class actions challenging the termination of benefits on the ground that medical improvement has not been shown.

26a. Second, it rejected the claim that the Reform Act's remand of certain cases to the Secretary [9]—some of which are also covered by the district court's order—is inconsistent with the relief in this case. Pet. App. 27a-29a.

This Court granted certiorari on October 7, 1985.

SUMMARY OF ARGUMENT

Respondents in this case sought to challenge a covert policy under which state claims adjudicators were directed by the Secretary to deny or terminate disability benefits to mentally ill persons solely because those persons did not suffer from an impairment that the Secretary has deemed to be a per se qualification for benefits. In effect, the Secretary prevented the initial decisionmakers from going on, as the regulations require, to assess each individual's actual ability to perform productive labor. This policy is conceded to have been illegal. The issue here is whether the courts have the power to grant relief to the thousands of applicants who were denied the required individualized assessment solely because those persons failed to pursue further administrative remedies or to file their judicial claims within 60 days of the denial of their claims.

1. The facts of this case demand application of the "collateral claims" exception to the exhaustion requirement first recognized in *Mathews v. Eldridge*, *supra*. Here, just as in that case, the applicants challenged one of the Secretary's policies on the basis of legal injuries distinct from, and "collateral" to, their claim for benefits. The separate injury here is the loss of a first-level evaluation that was provided by Congress, but was systematically taken away by the Secretary in a manner that was never disclosed to claimants. Respondents, in short, did not in this litigation seek benefits. They sought only the

[9] Section 2(d)(3) provides that the cases described in note 8, *supra*, be remanded.

right to a congressionally mandated procedure—and to a fair notice of the outcome of that procedure—that would have, at least for many class members, eliminated the need for administrative review, because they would have received their benefits or received reasons for a denial that would have been honest and legitimate. This particular injury could not have been redressed in the administrative appeal process because that process focuses solely on eligibility for benefits; it does not address—nor, in fact, could it have addressed—the Secretary's *undisclosed* procedural curtailment. Thus, a rule requiring these applicants to exhaust administrative remedies before raising their collateral legal claims would have been inconsistent with protecting their right to a fair first-level evaluation since the significance of that evaluation would have been totally eliminated by the very fact of exhaustion.

2. Respondents' suit is not barred by the sixty-day filing requirement provided in the statute. That limitations period begins to run from the time when a claimant receives an adequate statement of reasons for his denial. 42 U.S.C. § 405(b)(1); 20 C.F.R. §§ 404.904, 416.1404. In this case respondents never received such a notice since the notice that they received clearly failed to disclose the true reason for their denial—*i.e.*, that the Secretary had secretly changed the standards at the first level. In the absence of an adequate statement of reasons for denial, a claimant is unable to make a reasoned decision as to whether to challenge the denial, and thus the sixty-day filing requirement should not begin to run until fair notice is given.

ARGUMENT

I. RESPONDENTS' CHALLENGE TO THE SECRETARY'S SYSTEMATIC CURTAILMENT OF THE INITIAL DISABILITY DETERMINATION WAS COLLATERAL TO THEIR CLAIMS FOR BENEFITS AND THUS WARRANTS DIRECT JUDICIAL REVIEW.

A. The Governing Principles.

The key provision governing the jurisdiction of the federal courts in cases arising under the Social Security Act is 42 U.S.C. § 405(g). *See Heckler v. Ringer*, *supra*, 104 S. Ct. at 2021-22; *Weinberger v. Salfi*, 422 U.S. 749, 762-63 (1975). That section provides, *inter alia*, that judicial review is available only after a "final decision of the Secretary." This finality requirement has been interpreted to include both a nonwaivable requirement that claims be first "presented to the Secretary" and a waivable requirement that "administrative remedies prescribed by the Secretary be exhausted." *Mathews v. Eldridge*, *supra*, 424 U.S. at 328.

The Court, however, has recognized two district contexts in which exhaustion is not required. First, in several cases involving constitutional challenges to substantive limitations on benefits contained in the Social Security Act itself, the Court has been willing to reach the merits despite the absence of full exhaustion. In these cases, it was apparent that the administrative process could not address the constitutional claim and the Secretary either had failed to raise the exhaustion issue, *Weinberger v. Salfi*, *supra*, 422 U.S. at 767, or had conceded that administrative proceedings would be useless, *Mathews v. Diaz*, 426 U.S. 67, 76 (1976). These facts were enough to establish that the Secretary had effectively waived exhaustion. At the same time, the Court has been careful to note that a court may not "substitute its conclusion" as to the futility of administrative exhaustion "for the

contrary conclusion of the Secretary." *Weinberger v. Salfi*, *supra*, 422 U.S. at 766. Because the sole issue in these cases was the availability of benefits to the claimants, the Court sought to protect the Secretary's right to insist on exhaustion where he believes that the administrative process may moot the constitutional issue by revealing some other flaw in the applicant's claim or granting that claim under some other provision. *Id.* at 765.

The second "exception" to the exhaustion requirement, first announced in *Mathews v. Eldridge*, involves a quite different set of considerations. There, unlike in *Weinberger v. Salfi* and *Mathews v. Diaz*, the legal claim involved not substantive eligibility for benefits but the procedures used in making that determination. Eldridge asserted that he had a right under the Due Process Clause to a disability hearing *before* existing benefits could be terminated. This claim rested on the proposition that, absent a predeprivation hearing, a claimant would suffer irreparable harm merely by virtue of being required to do without his benefits during postdeprivation proceedings, even if he ultimately prevailed and had his benefits restored. Thus, this claim not only was distinct from Eldridge's claim for benefits, it also was a type of claim for which there would be no remedy if he was required first to exhaust these same postdeprivation proceedings before seeking judicial redress. It was this relationship between the claim and the effect of exhaustion that gave rise to the "collateral claims" rule, under which a court is empowered, in limited circumstances, to decide for itself that a given "decision" by the Secretary is sufficiently "final" to be brought to court without full exhaustion. *See Heckler v. Ringer*, *supra*, 104 S. Ct. at 2023 (describing *Mathews v. Eldridge*).

Application of this "collateral claims" doctrine depends on two key considerations. First, it is essential that the Court examine "the nature of the claim being asserted."

Mathews v. Eldridge, *supra*, 424 U.S. at 331 n. 11. That claim must be "entirely collateral to [the] substantive claim of entitlement" to benefits. *Id.* at 330. While there has been considerable discussion in this case about what it takes to make a claim *entirely* collateral,[10] we think that the basic idea is relatively straightforward: a claim is collateral if it would not be resolved by the granting of statutory benefits. In *Mathews v. Eldridge*, this element was satisfied by the claim that the denial of a pretermination hearing created a separate legal deprivation, with attendant injuries resulting from even a temporary loss of disability benefits to a person who relied on them for his very well-being. Where such separate legal injuries are alleged, they raise issues that cannot even be addressed—let alone resolved—through further administrative review. As a result, there is no longer any reason for the deference, mandated in *Weinberger v. Salfi*, *supra*, to the Secretary's determination about the futility

[10] As noted above, the court of appeals stated that respondent's claims were not "'wholly' collateral" but only "substantially collateral." Pet. App. 14a. In our view, it makes no sense to distinguish "wholly collateral" claims from "substantially collateral" claims simply because the collateral claims might be "somewhat intertwined" with the claims for benefits. Pet. App. 14a. After all, every person who challenges one of the Secretary's decisions under § 405(g) is seeking benefits and thus any claim is invariably "somewhat intertwined" with his claim for benefits.

Moreover, just last Term this Court rejected this distinction in the context of the collateral order doctrine. *See Mitchell v. Forsyth*, 105 S. Ct. 2806, 2816-17 & n.10 (1985). There, the Court held that a claim does not lose its distinctiveness from the merits simply because "the resolution of [its] legal issues . . . entail[s] consideration of the factual allegations that make up the plaintiff's claim for relief." *Id.* at 2817. The Court stated that a claim is collateral if it is "conceptually distinct" from the claim on the merits in that it can be decided "in isolation from the remaining issue of the case." *Id.* at 2816-17 & n.10. As we make clear below, the issues raised by respondents can certainly be decided in isolation from their eligibility for benefits.

of administrative exhaustion. Thus, in *Mathews v. Eldridge*, regardless of the outcome of the administrative proceeding with respect to Eldridge's substantive eligibility for benefits, that decision could not "answer his constitutional challenge." 424 U.S. at 332. The Secretary, in short, had given his "final" answer on the collateral claims raised.

The second key consideration emphasized in *Mathews v. Eldridge*, is the "consequences of deferment of judicial review." 424 at 331 n. 11. In addition to showing that his claim cannot be dealt with in the administrative appeal, the claimant must offer some further reason why litigation of that separate claim still should not be deferred until after the issue of benefits is resolved in the administrative process. In essence, he must show that requiring exhaustion would be *inconsistent* with the rights asserted. *Cf.* L. Jaffe, *Judicial Control of Administrative Action*, 426-29 (1965) (analyzing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938)). "The question is . . . whether [excusing exhaustion] is necessary to give realistic protection to the claimed right." *Id.* at 429.

Thus, for example, in *Mathews v. Eldridge*, the linchpin of plaintiff's claim was the assertion that any erroneous termination of disability benefits, however temporary, causes a harm that is not only separate and distinct, but also irreparable. Eldridge argued that a hearing must precede the termination of benefits because he suffered an irreparable injury each day that he was forced to live without his benefits while litigating his eligibility in the administrative process. Enforcement of the exhaustion rule would have prevented Eldridge from raising the constitutional issue until after the postdeprivation hearings had run their normal course. At that point, the irreparable injury would have been complete since, under El-

dridge's claim, an award of retroactive benefits would not provide sufficient redress.[11]

Viewed in this light, the collateral claims doctrine is entirely consistent with the principles followed in cases involving the appealability of "collateral" *court* orders. *See Mathews v. Eldridge*, *supra*, 424 U.S. at 331 n. 11 (citing 28 U.S.C. §§ 1257, 1291). In a long series of cases, this Court has relied on the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), in holding that defendants have a right to an immediate appeal of a denial of a motion to dismiss, where the right at issue includes the right not to be subjected to a trial. *See Mitchell v. Forsyth*, 105 S. Ct. 2806 (1985) (qualified official immunity); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (absolute official immunity); *Helstoski v. Meanor*, 442 U.S. 500 (1979) (speech and debate clause); *Abney v. United States*, 431 U.S. 651 (1977) (double jeopardy). In such cases, the usual rule—requiring defendants to hold their appeal until after entry of a "final" order—is modified because it is inconsistent with the rights being asserted. Put differently, allowing an immediate appeal is the only way

[11] The Court's decision in *Heckler v. Ringer*, *supra*, far from modifying these principles, reaffirms them. 104 S. Ct. at 2023. The Court there held that the collateral claims doctrine did not apply to a group of claimants who, at the initial decisionmaking phase, were denied Medicare benefits for a certain heart treatment under a policy of the Secretary. The Court found that these claimants had failed to raise claims that were separate from the issue of eligibility of benefits. By contrast, respondents in this case have riased two collateral claims that were not presented in *Heckler v. Ringer*. First, *Heckler v. Ringer* did not involve a due process challenge to a secret policy. Second, it did not involve any express conflict between the regulations and the directive of the Secretary that the claimants were seeking to attack. As described in detail below, respondents here raised both claims. In addition, unlike the claimants in *Heckler v. Ringer*, respondents have made no substantive claim for entitlement to benefits. The judgment below provides only for a fair assessment under the regulations. Pet. App. 64a.

to protect the right asserted by guaranteeing that an aspect of that right is not irreparably lost. After trial, liability can be reversed, but there is no way to redress the injury caused by the fact that the defendants were subjected to a trial from which they are lawfully shielded.[12] In sum, this Court has consistently recognized that exhaustion rules must be disregarded when they threaten the ability of the courts to vindicate the right that an individual is seeking to assert.[13]

B. The "Nature of the Claims" Asserted Here.

Applying the teachings of *Mathews v. Eldridge* to the present controversy, we turn first to a discussion of the particular claims at issue. There are two closely related collateral claims in this lawsuit. First, respondents sought redress for the clear denial of their right under the statute and regulations to a fair and individualized assessment of their level of disability at the initial stage of the administrative process. In addition, by emphasizing the covert nature of the illegal policy, respondents

[12] In various other contexts, the Court has been equally sensitive to the need to bypass exhaustion requirements when they come into conflict with the underlying right at issue. For example, it has repeatedly stated that a person need not exhaust administrative remedies where a case involves a challenge to the administrative procedures themselves. *See Staub v. City of Baxley*, 355 U.S. 313, 319 (1958); *Gibson v. Berryhill*, 411 U.S. 564, 575 (1973) (exhaustion not required when the "adequacy of the administrative remedy is for all practical purposes identical to the merits of the lawsuit").

[13] Our analysis of the collateral claims doctrine differs from petitioners' in two important respects. First, as we noted above, this Court has recently rejected the distinction suggested by petitioners between wholly collateral and collateral. *See Mitchell v. Forsyth*, *supra*, 105 S. Ct. at 2816-17. Either a claim is collateral or it is not. Second, petitioners fail even to identify the claims raised by respondents and then explore how those claims fare under the collateral claims doctrine. Petitioners erroneously assume that respondents have only raised claims for the benefits themselves.

have pointed to a second key issue here—the failure of the initial decisionmakers to explain the real basis for their decision to those claimants who were denied benefits. These claims are in every realistic sense "collateral."

1. *The Right to a Fair, Individualized Assessment.*

The Secretary's policy directed the initial disability decisionmakers—the state claims adjudicators—to ignore the governing regulations requiring individualized assessments of "residual functional capacity" and simply deny benefits to all mentally ill applicants who did not satisfy one of the per se listings of mental impairments. This directive certainly affected the substantive eligibility of claimants. Indeed, in a real sense it meant that for one class of eligible claimants, it was impossible to secure benefits at the initial stage of the process. However, the more important effect of the policy was procedural, not substantive. Here, the Secretary ordered the initial decisionmakers to follow a concededly illegal standard while ordering by regulation that ALJs follow a different standard. Thus, claimants in this disadvantaged class still had a chance to secure benefits, but they could only do so by litigating the issue in a full hearing in every case. For them, the initial stage of the process became not an opportunity, but a meaningless hurdle to be crossed on the way to an administrative trial. As a result, the Secretary's actions had the effect of denying altogether the claimants' right to a fair assessment at the initial stage.

The importance of this procedural right is clear. The disability application process is carefully constructed to allow the vast majority of eligible claimants to receive their benefits merely by applying to these initial decisionmakers. The purpose of the procedural structure was to ensure that the initial decisionmakers would, in most cases, not only screen out those who were ineligible but also find those who were eligible, according to the regulations, and begin providing them assistance. The underlying goal was to avoid the transformation of the disability program from a benefit into a burden imposed on those caught up in needless appeals.

This basic intent is revealed in a number of ways. First, Congress itself went out of its way to minimize errors at the initial stage. It specifically directed the Secretary to establish "performance standards" and other administrative requirements governing state decisionmakers "in order to assure effective and uniform administration" of the program. 42 U.S.C. § 421(a)(2). Then, as a further means of ensuring accuracy, it gave the Secretary the power to review any state determination "on his own motion." *Id.* § 421(c)(1).

The regulations go even further. They require that initial determinations must be made by a "disability examiner" qualified to evaluate medical evidence, 20 C.F.R. §§ 404.1615(c), 416.1015, in conjunction with a physician consultant who is given the specific responsibility of determining an individual's residual functional capacity, *id.* §§ 404.1546, 416.946. Speaking more generally, the states are responsible for creating an overall first level administrative structure, including "quality assurance" mechanisms, designed to "insure [that] disability determinations are made accurately and promptly." *Id.* §§ 404.1620, 416.1020. Finally, the regulations comply with the statutory directives by creating an elaborate system of "performance accuracy standards" for state decisionmaking, *id.* §§ 404.1640, .1643, 416.1040, .1043, combined with various federal enforcement mechanisms.[14]

The unmistakable purpose of these various safeguards was to assure that applicants would only be relegated to

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[14] Where the performance standards are not met, the SSA first attempts to provide technical and management assistance, *id.* §§ 404.1650, 416.1050, and ultimately may be required to take back responsibility for initial determinations from the state involved, *id.* §§ 404.1670, 416.1070.

administrative appeals after their particular cases had been examined fairly and carefully at the initial stage and they had been determined to be ineligible according to the regulations. The contrast between this intent and the actual operation of the system under the Secretary's illegal policy directives is striking. By foreclosing consideration of residual functional capacity, the directives cut out the key step in the decisionmaking process where the individual characteristics of the claimant are considered,[15] and where the role of medical expertise becomes most significant. As a result, a defined group of claimants were forced to appeal and litigate in order to have the fair, individualized assessment that they should have received at the initial stage.

The evidence contained in the record highlights the unfairness that resulted from the Secretary's policy. At trial, psychiatrists who were closely involved in the disability decisionmaking process, testifying for both sides, documented how the Secretary's policy suppressed the exercise of professional medical judgment as required by the regulations. Dr. Arthur Meyerson stated that in his medical judgment there were numerous chronically mentally ill persons who would not be entitled to benefits under the Secretary's categories of per se impairments, but would be far too ill to have the residual functional capacity to perform any kind of work. Tr. 316-17. Similarly, government-witness Dr. Maurice Osinoff, himself a review psychiatrist in the disability determination system, testified that on numerous occasions the Secretary's policy had resulted in the denial of benefits although in his medical judgment the claimant was unable to do any sort of work. J. App. 253-54. These views were echoed by another SSA psychiatrist, whose statements

[15] *See* 20 C.F.R. §§ 404.1545(c), 416.945(c) (in assessing the residual functional capacity of the mentally ill, "we consider factors such as your ability to understand, to carry out and remember instructions, and to respond appropriately to supervision, co-workers and work pressures in a work setting").

were included in a recent report by the General Accounting Office. He told the GAO that numerous claimants were denied benefits because they failed to qualify under the listings, even though "he kn[ew] that the individuals are precluded from competitive work." Social Security Reviews of the Mentally Disabled, Hearings Before the Senate Special Comm. on Aging, 98th Cong., 1st Sess. 17-18 (1983) (Prepared Statement of Peter J. McGough) [hereinafter cited as Senate Hearings].

In sum, the denial of a fair initial assessment in this case created precisely the harm that the statute and regulations sought to avoid. Under the Secretary's directive the initial stage of the claims process was transformed from an opportunity for a fair and professional determination of an individual's level of disability into a hurdle to be surmounted. As a result, this directive created a clear collateral claim.[16]

2. *The Right to an Accurate Statement of Reasons.*

This denial of an opportunity for a fair initial assessment was made still worse by the fact that the claims adjudicators did not advise claimants of the reason for their denial or termination of benefits. These claimants plainly had no way of knowing that their application had not received a full, five-step review, including an assessment of their residual functional capacity by a medical professional. Here again, the treatment accorded to the claimants was in clear violation of the governing statute and rules.

[16] As we note below, *see* p. 23 *infra*, this collateral claim argument is limited to cases where the Secretary creates an express inconsistency in the rules governing the initial and appellate stages of review. It would not apply in a case where the initial decisionmaker simply made a legal or factual error, since neither the statute or the regulations purport to guarantee an error-free initial assessment.

The notice of denial sent to claimants after their initial assessment stated that the claimant did not "meet . . . the . . . disability requirements for [benefits]." J. App. 101. More specifically, the notice tracked the regulations, stating in pertinent part that the regulations provide that "[t]he impairment must be so severe as to keep you from working . . . in any . . . substantial gainful work considering your age, education, training and work experience." J. App. 101. The notice went on to say that the initial decisionmaker had made this individualized assessment "[a]fter carefully studying your records, including the medical evidence." J. App. 101. It thus contained no indication that the decision was based solely on the listings of per se impairments. On the contrary, the notice was written in a way that was intended to give the impression that the decisionmakers had fully applied the criteria spelled out in the regulations and had concluded that the claimant was ineligible.

This form of notice was plainly in violation of an amendment to the Social Security Act that took effect in 1981. That amendment contained a requirement that any denial of benefits, including one by the first level reviewers, "shall contain . . . a statement of the case, in understandable language, setting forth a discussion of the evidence and stating the Secretary's determination and the reason or reasons upon which it was based." 42 U.S.C. § 405(b)(1).[17] In addition, a failure to give accurate reasons in this context raises serious due process concerns. Some statement of reasons has been deemed to be a fundamental aspect of due process in every decision of this Court addressing the question. *See, e.g., Ponte v. Real*, 105 S.Ct. 2192 (1985); *Mathews v. Eldridge, supra*, 424 U.S. at 338; *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

[17] This statutory obligation does not apply to all the class members since some of them had initial decisions made before the amendment went into effect in 1981. Yet even before that time, the Secretary's own regulations required that such reasons be provided. *See Mathews v. Eldridge, supra*, 424 U.S. at 338.

While there are several important purposes for requiring a statement of reasons, certainly among those purposes is a duty to inform citizens of the basis for governmental action. Where further reviews are available, such a statement is clearly important for the claimant (and those assisting him) in deciding whether to pursue those reviews. In the present case, as we discuss more fully below, there is strong reason to believe that the absence of an accurate notice contributed to the failure of many applicants to pursue their further appeals, precisely because those claimants did not know that they had been evaluated under standards quite different from those that would have been used on an appeal to an ALJ. Indeed, the Senate Report accompanying the amendment requiring a statement of reasons in this context drew this precise linkage, explaining that the intention was to make it "less likely" that claimants would appeal. S. Rep. No. 408, 96th Cong., 1st Sess. 56-57 (1979), *reprinted in* 1980 U.S. Code Cong. & Ad. News 1277, 1334-35.

C. The "Consequences" of Requiring Exhaustion In This Case.

As the foregoing sections demonstrate, respondents have at least two related claims that have significance independent of their substantive eligibility for benefits. Under *Mathews v. Eldridge*, then, the question becomes whether there is a sufficiently strong reason why the litigation of these collateral claims should not be deferred until after the individual claimant has exhausted administrative remedies with respect to his eligibility for benefits. *See* pp. 13-15 *supra*. Here, much as in *Mathews v. Eldridge*, there is such a reason because an exhaustion requirement would directly conflict with the very rights that respondents are seeking to assert.

This conflict exists with respect to both collateral claims. The interest protected by the right to a fair and individualized assessment of disability at the initial determina-

tion stage is an interest in not being required to seek administrative review and litigation in order to have someone make an eligibility determination according to the regulations. The statute and the rules seek to ensure that, in the vast majority of cases, eligible claimants will simply apply and be granted the needed assistance. The Secretary's policy contravened this right by mandating that, for one group of claimants, the initial stage would be a meaningless charade and that their only method of obtaining benefits would be to go through a more costly and protracted ALJ process.

Requiring exhaustion as a condition of seeking judicial redress for this claim would be no more defensible than for the claim raised in *Mathews v. Eldridge* or for those claims that have been found to warrant collateral review in cases where the claimants are asserting that they should be free from the judicial process altogether. *See* cases cited at p. 14 *supra*. In challenging the assessment provided to them at the initial stage, respondents are saying, in essence, that they each have a right not to have to pursue administrative reviews in order to have a fair, individualized determination applying the correct standards. Assuming the validity of that right, it can hardly make sense to require each claimant to go through the full range of administrative appeals as a condition of vindicating it. Just as in *Mathews v. Eldridge*, by the time the claimant could secure redress, he would have suffered the very harm he is seeking to avoid. Indeed, in contrast to *Mathews v. Eldridge*, where a claimant could at least eventually have his claim heard and receive retroactive benefits if it is meritorious, a claimant in this case loses his claim altogether since the de novo review by the ALJ effectively renders the initial denial meaningless.

The situation is only slightly different when one turns to the second right asserted here—the right to an accurate statement of the reasons for a claimant's denial of benefits. As we have noted, a correct explanation of the basis

for a decision helps claimants decide whether to pursue further review. Here, a large number of respondent class members may well have declined to pursue additional administrative remedies at least in part because they were told by SSA that they had been determined to be ineligible by a fair and neutral decisionmaker who applied the proper standards. In fact, of course, the information on which they relied simply was not accurate. The chances of a reversal on appeal were greater than the claimants could have known, because the ALJs would be the first persons in the process applying the full set of eligibility standards.

When such an individual complains in court about the misrepresentation he received from the government, it hardly makes sense to bar his complaint on the ground that he did not follow through on the very administrative procedures that he claims he was deterred from pursuing. In that situation, unlike in *Mathews v. Eldridge*, the problem is not that exhaustion would conflict in principle with the claim asserted. Instead, it is that exhaustion conflicts with the specific allegations made about the inevitable *effects* of the government's misconduct—*i.e.*, that the government itself deterred the claimant from seeking further review. In that situation, exhaustion simply makes no sense.

We should also emphasize that a decision applying the "collateral claims" rule to these kinds of circumstances would not significantly widen the category of cases in which exhaustion is judicially excused. It would not be enough for a claimant simply to argue that the initial decisionmaker made a legal or factual mistake in his particular case. In those circumstances there would be no collateral right to assert, because the statute and regulations plainly do not contemplate that the initial decisionmaking process will be error-free. On the contrary, any procedural process will inevitably entail a certain amount of error. *Individual* mistakes, of course, are precisely what administrative reviews are designed to correct.

D. The Concrete Effects of the Government's Conduct.

So far in our discussion of the special harms caused by the Secretary's illegal policy, we have talked in the abstract about the burdens of appealing from the initial decisionmaking process in order to have a fair assessment of eligibility, and the danger that an inaccurate notice of denial led many claimants to give up altogether. The reality of these concerns is made much clearer by focusing on the particular characteristics of the group affected here. For these mentally ill claimants, the harms caused by the illegal policy were far from speculative.

As the testimony at trial made clear, the claimants affected by this policy are severely and chronically mentally ill.[18] J. App. 202, 210-11, 230-31. Most are schizophrenic. Many are former patients in state mental hospitals, who have left state care in the wake of the deinstitutionalization movement of the past decade. They now face a constant struggle to find a place to live, food to eat, and some form of appropriate care. *See generally The Homeless Mentally Ill* (APA Task Force Report, H. Lamb ed., 1984). In the words of one psychiatrist "[t]hese are not people with mild anxiety or depression, but people that have experienced years of the most debilitating major psychiatric disorders, and who have been treated in psychiatric institutions." Ingall, *Determining Eligibility of Patients for SSI Payments: The Psychiatrist's Role*, 33 Hosp. & Community Psychiatry 851 (1982).[19]

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[18] The class was defined to include only those persons with diseases that are "severe," as that term is used by the SSA. Pet. App. 36a.

[19] The GAO Report provides several concrete examples. One man was 31 years old and had an I.Q. of 68. He had been on the disability rolls since 1976. He had a history of epilepsy as well as paranoid and catatonic episodes. He had been hospitalized several times over the past two decades. His handicaps included "high anxiety, confusion, poor auditory and visual memory, motor area deficits, and decompensation under stress." Senate Hearings, *supra*, at 20. Another man was 33 years old and suffered from chronic

For these kinds of claimants, there are especially significant reasons for concern when an illegal policy makes a full hearing before an ALJ a prerequisite to a determination under the regulations. These are people for whom, as the district court found, the "ordeal of having to go through the administrative appeal process" may itself be enough to "trigger a severe medical setback." Pet. App. 38a. Indeed, even the initial denial or termination alone can have a major impact. Psychiatrists have noted that such an event often causes stress that worsens the claimant's psychiatric condition, *see* Munetz & Roth, *Helping Chronic Patients Understand Agency Communications*, 33 Hosp. & Community Psychiatry 151 (1982), and may lead to self-destructive behavior, *see* Ingall, *supra*.

The devastating effects of termination on the chronically mentally ill were illustrated both in the 1983 Senate hearings and during the trial in this case. At the Senate Hearings, *supra*, at 39-40 (statement of Beatrice Braun, M.D.), one psychiatrist testified that improper termination had resulted in "rehospitalization," "marked regression," and "overwhelming anxiety."[20] Witnesses before the district court provided ample support for the court's finding in this regard. *See, e.g.*, J. App. 236 (statement

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paranoid schizophrenia. He had been hospitalized seven times between 1973 and 1982. A psychiatrist that examined him found that he could not tolerate stress or concentrate for any length of time, and that antipsychotic medications were required to control his aggressive impulses and to keep him in touch with reality. *Id.* at 21.

[20] Other witnesses testified about similar effects on claimants. *See* Senate Hearings, *supra*, at 71 (statement of Stephen Sachs, Attorney General of Maryland); *id.* at 183 (letter from Dr. Allen Lebovitz); *id.* at 237, 239, 241 (report by Carol Bellamy, City Council President, City of New York); *id.* at 257 (letter from John Creek, Executive Director, Luzerne-Wyoming County Mental Health Clinic No. 1); *see also* Social Security Disability Insurance Program, Hearings Before the Senate Comm. on Finance, 98th Cong., 2d Sess. 211-25 (1984) (listing examples of patient deterioration in a number of states resulting from termination or denial of benefits).

of Francine Cournos, M.D.); J. App. 204-05 (statement of Dr. Braun). For example, one witness stated that one of her patients, who had been making "his first attempt at training in several years," became paranoid and suicidal after receiving notice of termination, wanted to terminate therapy, and had to be hospitalized. Another patient who had been functioning at a minimal level prior to termination became "more and more depressed" and was later "found in his apartment by his roommates in a mute and unresponsive position; curled up on the couch, not responding to people trying to rouse him or call his name." J. App. 219-20 (statements of Peggy Lyons). Even the SSA has recognized that many mentally ill claimants denied benefits threaten suicide as a result, and that some carry out the threat. *See* 7 Mental Health Rep. (Capitol Publications, Inc.) No. 11, at 2 (May 25, 1983).

In light of these facts, there can be no real doubt that the Secretary's policy caused exactly the sorts of dislocations that the initial stage was designed to avoid by maximizing accuracy and minimizing the need for further administrative litigation. Likewise, the concern that an inaccurate notice of denial would *deter* further appeals also applies with special force here. The district court expressly found that the mentally ill had a much more difficult time than other claimants negotiating the procedural rigors of the complex Social Security system. Pet. App. 38a. They are therefore more likely to give up after an initial denial. A misleading statement of the reasons for denial only makes this likelihood all the greater.

The inability on the part of many class members to recognize that an appeal is appropriate was recently documented during the Senate hearings.[21] This inability

[21] *See* Senate Hearings, *supra*, at 71 (statement of Stephen Sachs); *id.* at 107 (statement of Dr. Arthur Meyerson); *id.* at 257 (letter from John Creek).

also finds support in the psychiatric literature, which points to several ways in which the mentally ill may fail to respond properly to an administrative review system. To begin with, such people often misunderstand both their own rights and the governmental action.[22] In addition, of course, mental illness itself often limits a person's ability to respond. For example, many mentally ill persons "are delusional and distrustful of the adjudication process." Anderson, *Social Security and SSI Benefits for the Mentally Disabled*, 33 Hosp. & Community Psychiatry 295 (1982). Others react in a passive manner, *see* Munetz & Roth, *supra*, which prevents them from seeking to correct erroneous decisions. Several studies have specifically noted that, without the help of outside advocates or assistants, mentally ill claimants who are rejected at the initial decisionmaking phase simply drop their claims. *See* Anderson, *supra;* Munetz & Roth, *supra*. In short, an erroneous decision at the first stage often means a final decision for the mentally ill.

For these reasons, it is even more important for the Court to recognize the compelling need in this case to apply the *Mathews v. Eldridge* rule and excuse this class of claimants from the exhaustion requirement. To insist on exhaustion here would not only be inconsistent in principle with the legal claims that respondents seek to raise, it would in practice insulate from any remedy a policy that caused real injuries to thousands of mentally ill persons.

[22] Many have impaired literacy skills, *see* Berg & Hammitt, *Assessing the Psychiatric Patient's Ability to Meet the Literacy Demands of Hospitalization*, 31 Hosp. & Community Psychiatry 266 (1980); Coles, Roth & Pollack, *Literacy Skills of Long-Term Hospitalized Mental Patients*, 29 Hosp. & Community Psychiatry 512 (1978); suffer from a lack of cognitive stimulation, *see* Munetz & Roth, *supra*; may have had to leave school early or suffer from mental retardation, *see* Berg & Hammitt, *supra*.

II. THE SIXTY-DAY PERIOD FOR FILING SUIT DOES NOT BAR RESPONDENTS' SUIT BECAUSE THE NOTICE PROVIDED TO THEM WAS LEGALLY INSUFFICIENT TO BEGIN THE RUNNING OF THE LIMITATIONS PERIOD.

In addition to their exhaustion argument, petitioners claim that the district court lacked authority to hear respondents' challenges to the Secretary's undisclosed policy because, as required by section 405(g), the class members did not seek judicial review of final decisions, "within sixty days after the mailing . . . of notice of such decision or within such further time as the Secretary may allow." The courts below relied on different bases for rejecting the Secretary's argument. The district court held that the Secretary could not raise the sixty-day limitation because she had failed to raise it in a timely manner. The court of appeals, however, held that the sixty-day period was a statute of limitations that had been tolled in light of the covert nature of the challenged policy. In our view, the Court need not reach these issues here since the decision below can be affirmed on narrower grounds.

The sixty-day time period for seeking review only begins to run after a claimant has received "notice" of the Secretary's decision. 42 U.S.C. § 405(g); 20 C.F.R. §§ 404.981, 416.1481, 422.210(c). As noted above, such a "decision" is defined by the statute and the regulations as including a statement of the "reason or reasons upon which [the decision] is based." 42 U.S.C. § 405(b)(1); 20 C.F.R. §§ 404.904, 416.1404.[23] Because the claimants

[23] Although the statutory notice requirement did not apply prior to 1981, the regulations in effect prior to that time did require a statement of reasons. *See* note 17 *supra*. There is no jurisdictional bar to relying on these regulations as a basis for holding that class members evaluated in 1980 did not get an adequate notice to trigger the 60-day limitations period. Even then, the statute allowed the Secretary to permit claimants to seek judicial review "within such time as the Secretary may allow." 42 U.S.C. § 405(g). By requiring statements of reasons, and then assuring that they were not adequate statements, the Secretary effectively extended the 60-day limitations period for respondents.

here never received such a statement, it follows that this sixty-day time period has yet to start running.

While this precise notice issue has not been addressed by this Court or the courts of appeals, our interpretation of the statute and regulations finds support in several decisions by various of the courts of appeals. The only such decision specifically to address the meaning of 20 C.F.R. § 422.210(c) held that the sixty-day period did not begin to run where the claimant could show that he had not received the notice required by the regulations. *See Matsibekker v. Heckler*, 738 F.2d 79 (2d Cir. 1984). In addition, several courts of appeals have interpreted judicial review time limitations under Title VII of the Civil Rights Act of 1964 as beginning to run only after actual notice, *see, e.g., Franks v. Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974), *rev'd on other grounds*, 424 U.S. 747 (1976), and have found that a notice that omits the limitations period is invalid, *see, e.g., Williams v. Hidalgo*, 663 F.2d 183 (D.C. Cir. 1980); *Allen v. United States*, 542 F.2d 176 (3d Cir. 1976); *Lacy v. Chrysler Corp.*, 533 F.2d 353 (8th Cir.) (en banc), *cert. denied*, 429 U.S. 959 (1976); *Gates v. Georgia-Pacific Corp.*, 492 F.2d 292, 295 (9th Cir. 1974). A notice that omits the real reasons for a denial is legally no better and should not be found sufficient to begin the limitations period.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the court of appeals.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 84-1923

IN THE

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OCTOBER TERM, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

—v.—

CITY OF NEW YORK, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE

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Heckler v. Ringer, 466 U.S. 602 (1984)	7, 10, 15n.5
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OTHER AUTHORITIES

H.R. Rep. No. 618, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News 3038 20

S. Rep. No. 408, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Ad. News 1277 23

Chairman of the House Select Committee on Aging, 97th Cong., 2d Sess., *Impact of the Accelerated Review Process on Cessations and Denials in the Social Security Disability Insurance Program* (Comm. Print 1982) 23n.9

R.L. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 3n.2

Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761 (1967) 19

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INTEREST OF AMICUS CURIAE

The Association of the Bar of the City of New York (the "Association") submits this brief in support of the position of the respondents.[1] The Association is a not-for-profit corporation whose members consist primarily of members of the bar who practice in the City of New York. The Association's purposes include "cultivating the science of jurisprudence, promoting reforms in the law [and] facilitating and improving the administration of justice." Constitution of the Association, Art. II.

1 Letters of consent to the filing of this brief have been obtained from the parties and filed with the Clerk in accordance with Rule 36.2 of the Rules of this Court.

This case presents important issues concerning the procedures of administrative agencies and review of their decisions by the federal courts. The Secretary seeks reversal solely on the basis of alleged procedural "defaults" by claimants who failed to exhaust their administrative remedies or to seek judicial review within the prescribed time. The requirements of exhaustion and timeliness, however, are premised on the assumption that the Secretary's administrative processes are fair and unbiased. In this class action, that assumption is contradicted by the unchallenged factual determinations of the District Court which found that the administrative process itself had been corrupted by a secret, illegal policy. Moreover, the District Court found that the claimants' alleged "defaults" had in large measure been caused by the Secretary's illegal policy.

Under Rule 23 of the Federal Rules of Civil Procedure, the determination of those facts in the context of the properly presented claims of the named plaintiffs is equally applicable to, and binding with respect to, all the members of the class. In these circumstances, there can be no excuse for the Secretary's invocation of the class members' alleged procedural "defaults." Accepting the Secretary's argument, the Association believes, will do a substantial disservice to the administrative process and is inconsistent with the historic role of the federal judiciary in providing equitable relief when the circumstances so require.

This brief was prepared by the Association's standing Committees on Administrative Law and the Federal Courts, composed of members of the bar interested in and experienced with respect to issues relating to administrative and federal court procedure.

STATEMENT

In this case, the Court is asked to resolve issues which arise because, for five years, the Social Security Administration was operating under a secret, illegal policy that deprived claimants of rights that were clearly theirs. In its implementation, the illegal policy had the effect of discouraging victims from challenging the agency either in court or in the administrative process. As a result, thousands of claimants allowed their administrative appeals to lapse or failed to seek judicial review within 60 days of the agency's final determination. Now that the illegal policy has been exposed, the Secretary is relying on the claimants' procedural "defaults" to argue that the federal courts are powerless to fashion a remedy for the policy's victims.

The pertinent facts are established by the findings of the District Court, as affirmed by the Court of Appeals. *See City of New York v. Heckler*, 578 F. Supp. 1109, 1112-16 (E.D.N.Y.), *aff'd*, 742 F.2d 729, 731-34 (2d Cir. 1984), *rehearing denied*, 755 F.2d 31 (2d Cir. 1985).[2] The Social Security Act, and rules and regulations promulgated thereunder, establish a complex system of administrative decisionmaking and review designed to determine eligibility for disability and supplemental security income benefits under Titles II and XVI of the Act. Insofar as is relevant here, this system required that there be an individualized determination of whether a claimant was able to engage in "substantial gainful activity." The Secretary, however, instituted a secret regime under which doctors and disability analysts made "findings" concerning claimants' ability to work that were not based on the claimants' individual capacity or on the doctors' and disability analysts' expert opinion about them. The "findings" were based on a presumption imposed by the Secretary.

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2 Under such circumstances, this Court has stated that it will not review findings of fact. *See* R.L. Stern & E. Gressman, *Supreme Court Practice* 290-91 (5th Ed. 1978).

In particular, the District Court found that the Social Security Act and regulations required an individual assessment of each claimant's ability to engage in substantial gainful activity except when the claimant's disability was one of those listed in the so-called "Listing of Impairments," an enumeration of certain disabilities so severe that they are presumed to preclude substantial gainful activity. In direct contravention of the Act and regulations, the Social Security Administration ("SSA") adopted an undisclosed policy under which claimants suffering from severe mental impairments were nonetheless conclusively presumed to be able to engage in substantial gainful activity unless their mental impairments were of the degree of severity listed in the Listing of Impairments. 578 F. Supp. at 1124-25. On the basis of that undisclosed policy, decisions by the New York State Office of Disability Determinations to approve applications for benefits were returned as erroneous by the SSA regional and central offices. *Id* at 1113-14. There was

> a strong incentive to conform to . . . central office policy as evidenced in the returns because quite serious consequences to the careers and bureaucratic standing of individuals may follow to those persisting in "mistakes." [SSA's] ultimate sanction would be to remove the entire disability program from the control of the state, resulting in the loss of hundreds of state government jobs.

Id. at 1114.

SSA's undisclosed policy, by causing returns, "pressured" state level SSA review physicians—charged with determining residual functional capacity, *id*. at 1113—and disability analysts employed by the New York State Office of Disability Determinations—charged with determining ability to work, in part on the basis of the claimants' residual functional capacity, *id*.—into making findings consistent with the policy. *Id*. at 1114.

> Physicians were pressured to reach "conclusions" contrary to their own professional beliefs in cases where they

> felt, at the very least, that additional evidence needed to be gathered in the form of a realistic work assessment.

Id. at 1124.

Neither the unlawful presumption established by the Secretary nor the fact that decisions were being based on it was revealed to the claimant. Thus, the claimant did not receive an individualized determination as was his or her right. Yet, under the Secretary's secret regime, it was made to appear, contrary to fact, that the "findings" were based on the doctor's assessment of the claimant's individual capacity.

The existence and effect of this secret policy were hidden from the agency's administrative law judges whose function it was to review the "findings" made by the doctors. The District Court found that the reviewing physicians' determinations were given "great weight" by administrative law judges in subsequent administrative appeals. *Id*. at 1125. As a result, the District Court found, the entire benefit determination system became corrupted by the Secretary's illegal, secret policy. *Id*. at 1113-14, 1124-25.

In these circumstances it is not surprising that many claimants did not seek the review which the Secretary now claims should have been sought. The claimants did not know about the secret illegal policy which was the real reason that their claims had been denied. As will appear below, the principles of finality upon which the Secretary relies have no application in the extraordinary circumstances of this case.

The merits of this class action are no longer in dispute. The only issues before the Court concern the proper definition of the class that is to be afforded relief. This action was brought on behalf of all residents of the State of New York who were denied disability or supplemental security income benefits under the Social Security Act, or for whom such benefits were terminated, on or after April 1, 1980, on the basis of an administrative finding that they were capable of substantial gainful activity despite the existence of a severe mental impair-

ment. 578 F. Supp. at 1114. The plaintiffs sought declaratory and injunctive relief against the Secretary of Health and Human Services, among other government officials, enjoining him from applying, in the determination of benefits, an unwritten presumption that persons with acknowledged severe mental impairments nevertheless retained sufficient residual functional capacity to engage in gainful activity unless their impairments satisfied the Listing of Impairments.

The District Court certified the class and rejected petitioners' jurisdictional arguments. 742 F.2d at 733. In doing so, the District Court necessarily determined that there existed questions of law and fact common to all members of the class and that the claims of the representative parties were typical of the claims of the class. *See* Fed. R. Civ. P. 23(a)(2)-(3). Petitioners have never disputed those findings.

The District Court found as a fact that the members of the class suffered from severe mental illness, commonly schizophrenia. Their illnesses were found to be degenerative. Each acute episode diminishes the functional capacity of the individual until "[u]ltimately, work becomes impossible." 578 F. Supp. at 1114-15. The District Court also found that the class members' illnesses were significantly affected by the administrative process in which they were required to participate:

> An erroneous termination or denial of benefits to a mentally ill person means more than that he or she will no longer receive benefits. To many it may mean a severe medical setback. Dr. Braun testified that one of her patients who had not been hospitalized for fifteen years was hospitalized as a result of the trauma of having benefits cut off. This was not a unique case. Some slip into acute paranoia while others become suicidal.

Id. at 1115. Moreover, "[t]he ordeal of having to go through the administrative appeal process may trigger a severe medical setback." *Id.* at 1118.

The District Court determined that each member of the class had either presented an application for benefits that had been denied by the Secretary or had been the subject of a termination of existing benefits. Before any termination of benefits, each class member returned to the Secretary a form in which the claimant asserted an entitlement to benefits. Failure to return the form would have resulted in termination by reason of non-cooperation rather than lack of need; such persons are not included in the definition of the class. *Id.* at 1117.

The District Court waived any failure by the class members either to exhaust their administrative remedies or to seek judicial review within the 60-day period prescribed by the Social Security Act. *Id.* at 1117-18, 1124. On the merits, the District Court ordered the Secretary to reopen all decisions denying benefits to members of the class, to redetermine those cases using proper standards, and to reinstate any benefits previously terminated until a proper determination was made. *Id.* at 1125.

The Secretary appealed the decision solely on procedural grounds, among them that the District Court lacked jurisdiction to award relief to class members who had failed to exhaust their administrative remedies or to seek review within 60 days. 742 F.2d at 734. The Court of Appeals held that neither contention had merit. *Id.* at 734-38.

The Court of Appeals rejected the Secretary's defense based on failure to exhaust administrative remedies on the basis of the criteria established by this Court's decisions in *Heckler v. Ringer*, 466 U.S. 602 (1984), and *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Court of Appeals held that, although not wholly collateral to their claim for benefits, the class members' claims were "substantially collateral" because they attacked a procedural defect in the Secretary's administration of benefits, not the Secretary's substantive standards for granting benefits. 742 F.2d at 736-37. The Court of Appeals also ruled that exhaustion would have been futile because "the administrative process cannot vindicate the procedural rights asserted in this

litigation." *Id.* at 737. Finally, the Court could "discern no legitimate interest to be advanced by requiring plaintiffs to travel through the administrative maze as a prerequisite of a judicial hearing." *Id.*

The Court of Appeals also held that the District Court had authority to waive the 60-day time limit for seeking review of the Secretary's decisions and properly exercised that authority. The claimants "did not and could not know that those adverse decisions had been made on the basis of a systematic procedural irregularity that rendered them subject to court challenge." Because the Secretary's "secretive conduct" prevented claimants from knowing of a violation of rights, the period of limitation was properly extended until they had a reasonable opportunity to learn of the facts concerning the grounds for challenging the decisions. *Id.* at 738.

SUMMARY OF ARGUMENT

This Court's decisions leave no question that the District Court had jurisdiction to render a judgment with respect to all members of the class. Of the three requirements normally applicable to judicial review of a denial of Social Security benefits—*presentment* of the claim to the Secretary, *exhaustion* of subsequent administrative remedies, and *timeliness*—only the first is a prerequisite for District Court jurisdiction, and the unchallenged findings of fact permit no dispute that this prerequisite was satisfied by every member of the class. The District Court therefore had jurisdiction of the claims of all the class members, including jurisdiction to accept or reject that Secretary's defenses to those claims based on lack of exhaustion and timeliness.

The District Court properly rejected both these defenses. Exhaustion would serve no purpose in this class action. The Secretary has had a full opportunity to address the common questions of law and fact properly presented by the named plaintiffs who exhausted their administrative remedies. As a

result of the findings of the District Court, binding with respect to all members of the class, every class member is entitled to have the Secretary's determination concerning his or her ability to work reversed and remanded in any administrative appeal or appeal to the District Court. Any administrative and judicial review proceedings that might have been completed, but were not, prior to the District Court's decision in this case necessarily would have reached the same result were it not for the Secretary's concealment of the concededly unlawful policy on which the denial of the class members' claims was based. Requiring exhaustion in such circumstances would be a purposeless display of red tape.

The District Court also found that the unavailability of benefits to mentally ill persons such as the class members aggravates their mental condition. To require such persons to engage in further administrative proceedings based on a record tainted by the Secretary's unlawful policy would further aggravate their ill health and cause them irreparable harm. This Court has explicitly held that such a threat of irreparable harm justifies waiving the exhaustion of administrative remedies.

The principles of finality that underlie the 60-day limit for seeking judicial review are premised on the assumption that the decision to be accorded finality was rendered in a fair and impartial manner by an unbiased decisionmaker. The Secretary concedes, however, that the decisionmakers charged with the initial evaluation of the class members' claims for benefits were subject to a secret policy of coercion that deprived their determinations of any color of impartiality or accuracy. Under historic principles of lawful procedure, the discovery that the class members did not receive an impartial determination of their claims dictates reopening those determinations without regard for the normal time limits for seeking review.

ARGUMENT

I.

THE DISTRICT COURT HAD JURISDICTION TO RENDER A JUDGMENT WITH RESPECT TO ALL MEMBERS OF THE CLASS.

This Court's decisions establish that the District Court had jurisdiction to render a judgment with respect to all members of the class. Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), generally establishes three conditions for judicial review of a denial of Social Security benefits: (1) *Presentment* of a claim for benefits to the Secretary, (2) *exhaustion* of the subsequent administrative remedies, and (3) *timeliness*, *i.e.* the commencement of review proceedings within 60 days of the Secretary's final decision. *See Mathews v. Eldridge*, 424 U.S. 319, 328 & n.9 (1976). Only the first of these requirements, presentment, is a prerequisite to the jurisdiction of the District Court, and that requirement has been satisfied by every member of the class. The remaining requirements may be waived under appropriate circumstances.

Section 205(g) provides:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow.

In construing the requirement of a "final decision of the Secretary," this Court has distinguished between a nonwaivable requirement that a claim for benefits be presented to the Secretary and a waivable requirement that the subsequent administrative remedies be exhausted. *See Heckler v. Ringer*, 466 U.S. 602, ____, 104 S. Ct. 2013, 2023 (1984); *Mathews v. Eldridge*, 424 U.S. at 328. Once a claim for benefits has been

presented to the Secretary, he has discretion to waive any further administrative proceedings. *Weinberger v. Salfi*, 422 U.S. 749, 766-67 (1975). The Secretary's determination whether or not to waive further administrative proceedings is itself reviewable by the District Court, and will not preclude judicial review of the merits in cases "where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." *Mathews v. Eldridge*, 424 U.S. at 330.

There is likewise no question that the timeliness requirement of section 205(g) is not a prerequisite to the jurisdiction of the District Court. In *Mathews v. Eldridge*, the Court described the 60-day rule as a waivable statute of limitations. 424 U.S. at 328 n.9 (citing *Weinberger v. Salfi*, 422 U.S. at 763-64). The Court refused to consider a defense based on the 60-day time limit on the ground that the defense was not properly raised in the lower courts. If failure to comply with the 60-day rule had deprived the courts of jurisdiction, this Court could not have so disposed of the issue. Subject matter jurisdiction cannot be conferred upon a federal court by stipulation of the parties, nor can its absence be waived by the parties. *See, e.g., Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978); *Louisville & Nashville Railroad v. Mottley*, 211 U.S. 149 (1908).

The District Court specifically found that each member of the class had presented a claim for benefits to the Secretary and that the Secretary had rejected the claim. That is obviously true for those members of the class who presented applications for benefits that were denied. It is also true for those whose preexisting benefits were terminated. Each of those class members returned a questionnaire to the Secretary before benefits were terminated in which he stated that benefits should be continued. That claim was clearly rejected by the Secretary when benefits were in fact terminated. This case is therefore indistinguishable from *Eldridge*, where the claimant answered a questionnaire and sent a letter asserting that his benefits

should not be terminated. This Court found that the claimant had sufficiently presented a claim for benefits to meet the nonwaivable requirement of section 205(g). *See* 424 U.S. at 329.

Accordingly, the District Court had jurisdiction to render a judgment with respect to all members of the class, including jurisdiction to reject the defenses asserted by the Secretary based on failure by the class members to exhaust their administrative remedies or to seek judicial review within 60 days. Whether it was correct to do so is considered below.

II.

THE DISTRICT COURT PROPERLY REJECTED THE DEFENSE ASSERTED BY THE SECRETARY BASED ON FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

The defense asserted by the Secretary based on failure to exhaust administrative remedies is without merit for two reasons. First, this is a class action in which at least some of the named plaintiffs *did* exhaust their administrative remedies. The Secretary therefore has had a full opportunity to address the issues of law and fact common to all the class members' claims in the context of claims typical of the entire class. The District Court's determinations concerning those common issues are binding with respect to, and require a reevaluation of the ability to work of, all the class members. No purpose would be served by requiring further administrative proceedings before remanding for that reevaluation.

Second, the lower courts found as a fact that requiring exhaustion of administrative remedies would cause irreparable harm that could not be corrected by any subsequent proceedings. Under the standards previously delineated by this Court, the facts and procedural posture of this case clearly dictate rejection of the Secretary's contentions regarding exhaustion.

A. The Adjudication of the Claims Properly Presented by the Named Plaintiffs Eliminates Any Rationale For Requiring Exhaustion of Administrative Remedies by the Class Members.

Exhaustion of administrative remedies should not be required of members of a certified class when (1) at least some of the named plaintiffs have exhausted their administrative remedies and (2) the District Court's determinations concerning the questions of law and fact common to the claims of the class members would compel the administrative agency to treat all the class members in the same manner that the District Court has ordered with respect to the named plaintiffs.

This Court's decisions evidence a practical rather than a formulaic approach to whether exhaustion should be required prior to judicial review. In *Mathews v. Eldridge*, the Court held that the District Court properly reviewed the Secretary's denial of benefits, even though the claimant had not exhausted his administrative remedies, because Eldridge raised a constitutional challenge that could not be vindicated at the administrative level. 424 U.S. at 330-32. Likewise, in *Weinberger v. Salfi* the Secretary was permitted to waive an administrative hearing when "the only issue to be resolved [was] a matter of constitutional law concededly beyond his competence to decide." 422 U.S. at 767. Both cases dispensed with further administrative proceedings when there simply was no point to them.

This case likewise presents an instance where exhaustion would serve no useful purpose, and would simply waste administrative, judicial and private resources. This is a class action in which at least some of the class representatives have exhausted their administrative remedies. In accordance with the requirements of Rule 23 of the Federal Rules of Civil Procedure, the District Court necessarily found that the claims of the named plaintiffs presented questions of law or fact in common with the claims of all the class members and that the claims of the named plaintiffs were typical of the class members' claims. Accordingly, the named plaintiffs' exhaustion of

their administrative remedies ensures that the Secretary has had a full opportunity to consider and render a decision with respect to the common questions.

The District Court's determinations concerning the common issues of law and fact conclusively establish the class members' right to a reevaluation of their capacity to work. In this class action, the judgment of the District Court is conclusive not only as to the named plaintiffs, but as to all the class members. *See Cooper v. Federal Reserve Bank*, 104 S. Ct. 2794, 2799 (1984). Because the District Court found that the Secretary's policy pressured physicians and disability analysts to make unjustified findings as to all the class members' ability to work, the record upon which any administrative review would proceed is unlawfully biased against the claimants. None of the class members' eligibility for benefits can be determined on the existing record.

The only possible result in any future proceeding is that which the District Court has already ordered: A reopening of the record for a new determination by the physicians and disability analysts of the New York State Office of Disability Determinations concerning the claimant's ability to work and a continuation of terminated benefits until a new determination is made.[3] There likewise can be no question that any administrative and judicial review proceedings in the past should have had the same result, and would have but for the Secretary's concealment of a policy now conceded to be unlawful. Accordingly, nothing would be gained by requiring the class members to present the same common questions of law and fact at each of the successive stages of the Secretary's administrative procedure prior to the predetermined remand for reevaluation of their ability to work. Neither can there be any justification for

3 There is no merit to any argument that claimants should be required to exhaust administrative remedies to enable the Secretary to identify alternative grounds for denying benefits. The administrative review process is designed to correct errors in denials of benefits. It is not designed to identify possible alternative grounds for denying benefits.

denying benefits to class members who failed in the past to exhaust administrative remedies that would necessarily have achieved the same result were it not for the secrecy of the unlawful policy.[4]

"Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefits of its experience and expertise, and to compile a record which is adequate for judicial review." *Weinberger v. Salfi*, 422 U.S. at 765. None of those benefits would have attended further administrative review here, and the defense asserted by the Secretary based on failure to exhaust administrative remedies is without merit.[5]

4 This case is not within the scope of the Court's dictum that "a court may not substitute its conclusion as to futility for the contrary conclusion of the Secretary" in *Weinberger v. Salfi*, 422 U.S. at 766. In that case the Secretary had concluded that further administrative proceedings would be futile because he could not grant the relief sought by the claimants. This case presents the opposite situation in which the reviewing courts could not possibly fail to order the remand for reevaluation of ability to work sought by the class members. Exhaustion should be waived in this case, not because it cannot provide the desired relief, but because success is a foregone conclusion.

5 *Heckler v. Ringer*, upon which petitioners strongly rely, is clearly distinguishable because it dealt with exhaustion of remedies by named plaintiffs rather than unnamed class members, because the challenged agency directive did not apply to three of the plaintiffs, and because the fourth had not even presented a claim to the Secretary. In fact, this case presents the factual situation that this Court found did *not* exist in *Ringer*. In *Ringer*, the plaintiffs contended that "there would be a presumption against them as they pursue their administrative appeals because of the very existence of the Secretary's instructions and her formal ruling." 466 U.S. at ____, 104 S. Ct. at 2024. However, there was no factual finding by the District Court that the Secretary's directive in any way affected the findings contained in the claimants' records before the agency, and this Court took note that the administrative law judges consistently ruled in favor of parties asserting claims like plaintiffs' when they pursued appeals. *Id.* Here, in contrast, the District Court found as a fact that SSA's policy *did* distort the records on which administrative review would be based and that there *would* be a bias against the claimants in pursuing their administrative appeals.

B. Requiring Exhaustion Would Cause Irreparable Injury.

Exhaustion of administrative remedies should be waived because it would cause irreparable harm. This Court has held that it is a "core principle that statutorily created finality requirements should, if possible, be construed so as not to cause . . . potentially irreparable injuries to be suffered." *Mathews v. Eldridge*, 424 U.S. at 331 n.11.

The District Court specifically found that "[t]he ordeal of having to go through the administrative appeal process may trigger a severe medical setback." 578 F. Supp. at 1118. Such setbacks diminish the patient's remaining functional capacity. *Id.* at 1114-15. The District Court specifically found that "[i]nterim benefits will not adequately protect plaintiffs from this harm. Nor will ultimate success if they manage to pursue their appeals." *Id.* at 1118. Under the decisions of this Court, these factual findings require affirmance of the District Court's determination to waive further administrative proceedings.

In *Mathews v. Eldridge*, the claimant's disability benefits were terminated prior to a hearing. Instead of pursuing his administrative remedies, Eldridge sued in District Court to have his benefits reinstated pending a hearing. This Court waived the requirement that Eldridge exhaust his administrative remedies.

> A claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a post-deprivation hearing. In light of the Court's prior decisions, Eldridge has raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments.

424 U.S. at 331 (citations omitted).

Here, plaintiffs established as a fact that their medical condition and their dependency on disability benefits was such that requiring them to exhaust their administrative remedies would have damaged them in a way not recompensable through relief granted after administrative review. Since any administrative review proceedings would have been tainted by the unlawful determination of capacity to work, such proceedings would have inflicted irreparable harm without offering a fair opportunity to demonstrate a right to receive benefits. No judicial or administrative policy can justify visiting such irreparable harm upon claimants in these circumstances. The District Court correctly waived any requirement that the class members exhaust their administrative remedies.

III.

THE DISTRICT COURT PROPERLY REJECTED THE DEFENSE ASSERTED BY THE SECRETARY BASED ON THE PASSAGE OF TIME.

The Secretary asserts that the courts below erred in granting relief to those class members who failed to bring suit within 60 days of the Secretary's decision denying or terminating benefits. As shown above, the 60-day requirement does not limit the jurisdiction of the District Court. Rather, the requirement is like a statute of limitations and may be tolled by a court in certain circumstances. The question is not whether the courts below had the power to grant relief but whether that power was appropriately exercised in this case.

The federal courts may toll statutes of limitations in appropriate circumstances even when the statutes have no specific provision authorizing such tolling. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 556-59 (1974); *see Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982). The principle of tolling applies in suits against private parties, *see Dickson v. Patterson*, 160 U.S. 584, 592 (1896) and, more important here,

in suits against government officials, *see Honda v. Clark*, 386 U.S. 484 (1967).

There is nothing in section 205(g) to suggest that Congress meant to preclude tolling. *See Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) (absent the "clearest command" from Congress, federal courts retain power to give equitable relief). To the contrary, tolling is consistent with congressional intent. First, when section 205(g) was enacted, the principle was well established. *See Holmberg v. Armbrecht*, 327 U.S. 392 (1946); *Exploration Co. v. United States*, 247 U.S. 437 (1918); *Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1874). Second, the Social Security Act is remedial and is designed to be particularly solicitous of those, like claimants, with severe mental or physical disabilities. *See Parker v. Califano*, 644 F.2d 1199, 1203 (6th Cir. 1981); *cf. Social Security Board v. Nierotko*, 327 U.S. 358, 364 (1946). Finally, section 205(g) and the regulations thereunder provide that the Secretary may extend the 60-day period indefinitely. 20 C.F.R. § 404.988.[6] It would be anomalous in these circumstances to suggest, as the Secretary does, that Congress intended to preclude the federal courts from applying the doctrine of tolling when to do so would further the policies of the Act.

In deciding whether to apply the principle of tolling in this case, it is appropriate first to explore the policies that support the time limit involved here. The 60-day time limit is designed

6 The decision in *Califano v. Sanders*, 430 U.S. 99 (1977), that the District Court lacks jurisdiction to review the Secretary's decision not to reopen a denial of benefits is not applicable to this case. *Sanders* involved a challenge to a purely discretionary decision not to reconsider a denial of benefits alleged to be erroneous as a factual matter, whereas in this case the Secretary is required to reevaluate claimants' capacity to work in order to satisfy its obligation to render an unbiased decision in accordance with the applicable laws and regulations. The Secretary's covert failure to follow lawful procedure presents issues analogous to the constitutional questions that the Court expressly excluded from its holding in *Califano v. Sanders* on the ground that they are "unsuited to resolution in administrative hearing procedures," *id.* at 109.

to give finality to the decisions of the primary decisionmakers—in this case the decisionmakers within the administrative agency. Finality is important because it fosters respect for the administrative process and protects the system of administrative review from being disrupted by the haphazard reopening of claims. Underlying these important policies, however, is the assumption that the administrative process itself is worthy of protection—that it is an honest, open, fair process reasonably designed to arrive at correct decisions.

Honesty and openness in administrative decision-making are prerequisites to legitimacy. "[T]he validity and moral authority of a conclusion largely depend on the mode by which it was reached." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring). The kind of "secret law" which is at issue here is an "abomination." Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 779 (1967); *see NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975). "[A]n agency will not be permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as 'formal,' 'binding,' or 'final.'" *Schlefer v. United States*, 702 F.2d 233, 244 (D.C. Cir. 1983).

Specifically in the context of the Social Security Act, Congress has recognized the importance of honest and open decision-making. The Social Security Administration is supposed to pay particular attention to the welfare of claimants during the administrative process. *See Richardson v. Perales*, 402 U.S. 389, 403 (1971). For example, hearings before administrative law judges are not adversary proceedings. *Cowart v. Schweiker*, 662 F.2d 731, 735 (11th Cir. 1981). The administrative law judge has a duty to explore all relevant facts "scrupulously and conscientiously," including facts favorable to the claimant. *Cox v. Califano*, 587 F.2d 988, 991 (9th Cir. 1978); *see Gold v. Secretary of Health, Education & Welfare*, 463 F.2d 38, 43 (2d Cir. 1972). When benefits are denied, the Secretary is required

to state "in understandable language" the "reason or reasons upon which" the decision was based. 42 U.S.C. § 405(b); *see* 20 C.F.R. §§ 404.953(a), 404.9004, 416.1404, 416.1412, 416.1453; *see also Mathews v. Eldridge*, 424 U.S. at 345-46 ("A further safeguard against mistake is the policy of allowing the disability recipient's representative full access to all information relied upon by the state agency").

Congress has recently recognized the need for fuller disclosure of the policies of the Social Security Administration. "[I]t is appropriate for changes in policies that affect whether or not people receive disability benefits to be published in regulations allowing for public participation in the process." H.R. Rep. No. 618, 98th Cong., 2d Sess. 21, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3038, 3058. Consequently, Congress passed an amendment requiring the development of uniform standards for disability review and directing that such regulations be promulgated under the Administrative Procedure Act, 5 U.S.C. § 553. Social Security Disability Benefits Reform Act of 1984, Pub. Law No. 98-460, § 10, 98 Stat. 1794, 1805. The new legislation confirms the importance of disclosure in disability policymaking by demonstrating a legislative determination that the sources of "real operating policy" be made public. H.R. Rep. No. 618, *supra*, at 20, 1984 U.S. Code Cong. & Ad. News at 3058. Congress also recognized that "[a]ll administrative law relies heavily on the presumption that agencies will perform their duties in good faith." *Id.* at 22, 1984 U.S. Code Cong. & Ad. News at 3059.

These basic assumptions of honesty, openness, and fairness were not justified in this case. The administrative process itself was corrupted. The agency operated under an illegal and secret regime of decisionmaking. Its illegal policy insured that often the process would come to the wrong result and would do so in a way—surreptitiously—that rendered the agency's own review mechanisms ineffective. *See* 578 F. Supp. at 1116, 1124. By tainting the physicians' and disability analysts' reports, the Secretary's illegal policy undercut the cornerstone of the administrative scheme: Unbiased medical determinations to which the claimant is supposedly given full access. *See Mathews v. Eldridge*, 424 U.S. at 344-46. In these circumstances, there is no justification for giving the weight that is ordinarily accorded to the policies of finality.

Moreover, exercising the courts' equitable powers to extend the 60-day limitations period would not do violence to the policies of the Social Security Act in general or section 205(g) in particular. Regulations under section 205(g) make quite clear that concerns about finality often give way to a desire for accuracy in decisionmaking. For example, the Secretary may reopen a determination "for any reason" within 12 months of the initial determination. Upon proof of "good cause," this period may be extended to 48 months. Finally, under circumstances of fraud or similar fault, reopening may be allowed at any time. 20 C.F.R. § 404.988(a)-(c).

Indeed, extending the time limits in the extraordinary circumstances here would further the policies of the Act. An important factor in the claimants' "defaults" was the fact that the Secretary's illegal policy was kept secret. The effect of secrecy may be seen clearly if one imagines the situation of an attorney asked to advise an unsuccessful claimant about the advisability of seeking review in the District Court. The District Court is generally bound by the record made before the agency. *See* 42 U.S.C. § 405(g). The record reviewed by the attorney would not have revealed the illegal policy. There was no way to know that the medical "findings" were not based on

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7 In a separate context, the Secretary has urged that questions of timing should be subordinated to the need for quality and uniformity in the agency's decisions. *See Heckler v. Day*, 104 S. Ct. 2249, 2254-56 (1984). This Court recognized that Congress has given priority to substantive accuracy over speed. *Id.* In this action, the Secretary has reversed his concerns, apparently feeling that the 60-day period must be applied even in the face of evidence that the secret policy distorted the accuracy of decisions, *see* 578 F. Supp. at 1116 (secret policy was contradicted by medical judgments). *Cf. Mathews v. Eldridge*, 424 U.S. 319 (1976) (weighing the contribution of procedural rights to substantive accuracy).

an individualized assessment of the claimant's capacities. Indeed, the record seemed to say—falsely—that the physician's findings were based on his or her best expert opinion about *this* claimant's capacities.

The record facing the attorney would be a powerful deterrent to seeking review. On what grounds would review be sought? In giving his or her advice, the attorney would have to consider the financial burdens of suing, his or her own ethical obligation to desist from bringing meritless actions and, very important here, the severe psychological trauma to the claimant that could result from bringing suit. The District Court expressly found that "[t]he ordeal of having to go through the administrative appeal process may trigger a severe medical setback." 578 F. Supp. at 1118. In these circumstances, an attorney would be irresponsible if he or she recommended proceeding.

It is no wonder then that so many of claimants, in the Secretary's view, "defaulted." How could it be otherwise? The "defaults" were a natural consequence of the Secretary's own illegal policy. Claimants lacked knowledge of the policy and could not have been on notice that such a policy was in effect. As the District Court found, "[m]embers of the class could not attack a policy they could not be aware existed." *Id.* at 1118.[8]

Because the secrecy of the illegal policy caused the alleged "defaults," giving weight to those defaults is in effect rewarding the Secretary's own misconduct. Such a reward is contrary to basic equitable principles. Further, rewarding the Secretary in this way would do an important disservice to the administrative process by encouraging future illegal policies of a similar nature.

Finally, a failure to toll the 60-day period for seeking review in this case will substantially increase the burdens on the

8 The secret policy was in effect until "at least the early months of 1983." 578 F. Supp. at 1115. This action was filed on February 8, 1983. 742 F.2d at 733. "[T]he full extent of the Government's clandestine policy was uncovered only in the course of this litigation." *Id.* at 738.

administrative process and the federal judiciary. A reversal of the judgment of the Court of Appeals will likely encourage, if not require, the filing of "protective" lawsuits even if no current reasonable basis for appeal appears on the face of the administrative record. Such a "protective" lawsuit would be justified in order to meet the possibility that, sometime in the future, a secret illegal policy will be uncovered. In that case, the claimant who has filed a protective suit which has been found to be without merit could later seek further judicial consideration when the illegal policy was uncovered. *See generally* Fed. R. Civ. P. 60(b) (relief from judgment).

The result could be a flood of filings in the District Court. Such a result would be inconsistent with the concern expressed by Congress when it adopted a statute requiring fair notice to claimants of the reasons for denying disability benefits. *See* 42 U.S.C. § 405(k)(1). Adequate notice to the claimant was expected to "add a number of positive factors to the adjudication process . . . . [T]he claimant may be less likely to appeal the decision if he understands how the law relates to his particular case." S. Rep. No. 408, 96th Cong., 2d Sess. 56, *reprinted in* 1980 U.S. Code Cong. & Ad. News 1277, 1334-35. These additional filings would not only squander judicial time,[9] they might prejudice truly meritorious disability filings. *Cf. Brown v. Allen*, 344 U.S. 443, 537 (Jackson, J., concurring) ("[H]e who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search"). Such an improvident use of judicial resources would be stemmed by affirming the judgment of the Court of Appeals.

9 About one-third of the claimants denied relief by the Appeals Council seek judicial review. *See* Chairman of the House Select Committee on Aging, 97th Cong., 2d Sess., *Impact of the Accelerated Review Process on Cessations and Denials in the Social Security Disability Insurance Program* 3 (Comm. Print 1982). During fiscal 1984, 24,215 cases were commenced in the District Courts involving Social Security disability matters, which represented over nine percent of all civil filings. *See* 1985 *Admin. Off. Ann. Rep.* A-24 to -25. If only one-half of those who do not appeal now decided to file protective appeals, approximately 25,000 cases would be added to District Court dockets.

CONCLUSION

The judgment should be affirmed.

Dated: New York, New York
January 28, 1986

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AMICUS CURIAE

BRIEF

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No. 84-1923

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, *ET. AL.*,
Petitioners,

v.

NEW YORK CITY, *ET AL.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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January 1986

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BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF RESPONDENTS, CITY OF NEW YORK, *ET AL.*

INTEREST OF THE AMICUS CURIAE

This brief amicus curiae is filed on behalf of the more than 1,700 local governments, which are political subdivisions of states, and members of the National Institute of Municipal Law Officers [NIMLO]. The member local governments operate NIMLO through their chief legal offices, variously called city attorney, county attorney, corporation counsel, city solicitor, director of law, and other titles. Each member local government has one vote on all

actions taken by the NIMLO organization. This brief amicus curiae is signed by the chief legal officers of NIMLO members on behalf of their own local governments and in their official capacity as a member of NIMLO's Executive Committee empowered to act for that organization. New York City is a member of NIMLO.

This case involves an attack on an illegal procedure that resulted in a denial of benefits due mentally ill persons under the Social Security Act. The district court found as a fact that the Secretary of Health and Human Services consistently applied an illegal policy in adjudicating the claims for benefits of severely mentally ill individuals and that the conduct of the Secretary prevented those members of the class here represented from becoming aware of the violation of their rights. The decision of the Second Circuit Court of Appeals upholds these rights as to the liability of the Social Security Administration to grant these persons benefits as opposed to forcing the City of New York to pay this federal liability. NIMLO submits this brief in support of appellees' position that the Court of Appeals was correct in waiving a Social Security final decision requirement and in tolling the time limitation of the Social Security Act, 42 U.S.C. § 505(g). NIMLO and its member cities fear that refusal to affirm the decision below will further an adverse impact on the fiscal and social interests of New York City and NIMLO's other member cities. NIMLO cities wish to vindicate two interests: First, the right of their mentally disabled citizens to a fair, as well as prompt, resolution of their Social Security eligibility determinations for disability benefits and, second, the security of their own finances which are drained by the procedure of Federally forced locally financed assistance.

"Cooperative federalism" is the phrase used to describe a broad constructive partnership between federal and state

and local governments covering many governmental programs. It is important that the creation of federal entitlements, such as social security protection, do not overburden state and municipal finances during this period when states and cities are being required to shoulder greater responsibilities in caring for their citizens.

NIMLO, therefore, respectfuly urges this Court to affirm the decision below which narrowly tailored its relief to permit a class of claimants with severe mental disabilities, who were denied benefits through an unpublished procedure of which they were unaware and which was contrary to existing federal regulations, to have their cases properly reviewed. This remedy will secure the right of New York City's disabled citizens to have a fair and just determination of their claims and will protect the financial integrity of the city and other cities similarly affected. Consent to the filing of this brief has been given by counsel for both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

Anyone who claims disability in New York is referred to the Social Security Income Benefits Division of the Social Security Administration. During the pendency of their application and appeals, claimants receive local public assistance or "Home Relief" benefits which are 50 percent funded by New York City and 50 percent funded by the state. See New York Social Services Law § 157 (McKinney's 1983). The City receives automatic reimbursement from the Secretary of Health and Human Services for the public assistance it has paid to individuals who are determined to be eligible for Social Security Insurance (SSI) benefits. 42 U.S.C. 1383(g). (New York City is not

awarded automatically reimbursement for assistance paid to SSI claimants who are determined to be eligible following the appeals process.) [Trial Tr. 277-280] However, the longer period of time between the initial determination of ineligibility and the disposition of the appeal, the more assistance New York City and other municipalities have to pay.

The district court found that for several years the Secretary enforced a systematic clandestine policy under which Social Security benefits were terminated or denied to chronically severely mentally ill claimants without the required individualized assessment of these claimants' ability to work, 20 C.F.R. §§ 404.1520(e), 416.920(e). The court also found that many of these individuals who were illegally denied federal benefits turned to citizens and localities for financial support and that others became homeless. Based on these findings the district court stated that waiver of the final decision requirement under 42 U.S.C. § 405(g) and the tolling of its time limitation are permitted under the factual circumstances presented in the case. The district court ordered the Social Security Administration to reopen all adverse administrative decisions by the Secretary of those class members determined to have a severe functional psychotic or functional non-psychotic mental impairment. The court also required that those individuals who were terminated from the disability rolls were to receive interim benefits until such time as the Social Security Administration made a procedurally correct determination that those members were no longer eligible for disability benefits. Those members who had an active administrative appeal of a state agency decision pending before an administrative law judge or the appeals council could elect to have their cases decided on that appeal instead of by reopening their cases. 578 F. Supp.

1125. The Court of Appeals affirmed the district court's findings and affirmed the district court's remand of the class members' cases to the SSA system for review.

The relief ordered by the district court was limited to redressing the unlawful injuries found. The relief gives these mentally disabled claimants an opportunity to have their claims determined on a legal and non-arbitrary basis and for those who ultimately succeed in receiving benefits, much of the financial burden left by the Secretary's unlawful policy will be removed from New York City and other local governments.

The decision of the Court of Appeals should be affirmed. Affirmance of the decision will relieve cities of the tremendous social and financial burdens they have been forced to bear as the result of the Secretary's illegal policies. Such financial relief was intended by Congress where it enacted the Social Security and SSI disability programs.

ARGUMENT

I. CONGRESS, IN ENACTING THE SOCIAL SECURITY AND SSI DISABILITY PROGRAMS, INTENDED THAT STATES AND CITIES BE GIVEN RELIEF IN ASSISTING THE MENTALLY DISABLED

The Social Security Disability and Supplemental Security Income programs were enacted partially to relieve state and local government welfare burdens through joint federal and state participation. This purpose is evident from the language of the statute itself. The SSI statute allows the Secretary to contract with the states to set standards of medical assistance eligibility and administer state supplemental programs. 42 U.S.C. § 1382c. The Secretary also is required to reimburse states for their costs in servic-

ing blind or disabled individuals under state vocational rehabilitation programs under 42 U.S.C. § 1382d. In turn, the states are required to maintain the same level of SSI benefits they provided to individuals who were receiving benefits under federal-state programs replaced by the SSI program,[1] and to continue to pass through cost-of-living increases to SSI recipients. 42 U.S.C. § 1382. See also 42 U.S.C . § 1382i(d) (funds appropriated for medical and social services pilot program for certain handicapped individuals); 42 U.S.C. § 1383(g) (reimbursement to states for interim assistance payments).

The legislative history of the SSDI, and especially the SSI statutes, clearly shows Congress' intent to shift financial responsibility for the disabled to the federal government and highlight the reason why the federal government cannot be permitted to shift the burden back to states and municipalities. Prior to the SSDI program in 1956, the burden of caring for the disabled was carried by state, local, community and private resources. When the Social Security Act of 1935 was reported from the House Committee on Ways and Means, the Committee's Chairman, Rep. Doughton stated that:

> The problem of dependency in old age is primarily a state *and local* responsibility though we must not overlook its national or interstate aspect. . . old age pensions supported exclusively by the state and local governments mean only that the wealthier states and the wealthier communities within those states will actually be able to provide such aid. *In other communities, old age pensions can be provided only at the expense of the schools or other essential functions of government.* The need for federal aid is so obvious that

[1]Pub. L. 93-66, Title II, Part B, § 212, as amended.

> it hardly requires statement. 79 Cong. Rec. 5, 469 (1935) (emphasis added).

The background of the 1950 amendments to the Social Security Act discusses the amounts spent in the previous years for the needy elderly. Of the 1.4 billion spent nationally on public assistance composed of financial assistance from federal, state and local governments to the elderly poor, state and local governments contributed over $600 million, or more than 42% of the money. S. Rep. No. 1669, 81st Cong. 2d Sess. *reprinted in* 1950 U.S. Code Cong. Service 3287. The Committee on Finance urged passage of the Amendments increasing benefits by reasoning that unless Social Security insurance was increased so as to offer true basic security to the retired, there would be an increasing need for more money to be spent on "less constructive" public assistance. S. Rep. No. 1669, 81st Cong. 2d Sess. *reprinted in* 1950 U.S. Code Cong. Service, 3288. Notwithstanding the fact that "public assistance" meant state and local as well as federal relief payments, the Committee report shows at the least an implied congressional purpose to benefit state and local governments by freeing their treasuries of some of the burdens of increased public assistance.

The Social Security amendments of 1956 which instituted the Federal Disability Insurance program also acknowledge the burdens which caring for the disabled places upon state and local funds. The report of the Committee on Finance recognized that "prolonged and severe disability is a serious problem to the worker, his family, and the *community.*" S. Rep. No. 2133, 84th Cong. 2d Sess. *reprinted in* 1956 U.S. Code, Cong. and Ad. News 3, 38798 (emphasis added). The report went on to state that while some of the disabled or their children obtained assistance under federal programs to aid the blind or dependent children,

many of the disabled drew their support from "state and local general assistance programs." S. Rep. No. 2133, 84th Cong. 3d Sess. *reprinted in* 1956 U.S. Code Cong. & Ad. News 3,3880.

The original disability insurance program provided only for disabled workers aged fifty years or older until the age limit was replaced in 1960. The legislative history of the 1960 amendments shows congressional awareness of the continuing drain on state and local treasuries caused by assistance payments to the disabled under fifty. "Many [of the disabled] who would be eligible for disability benefits except for the age limitation are now receiving payments under *public assistance programs.* With insurance benefits available to them, some of these individuals would no longer need assistance payments." S. Rep. No. 1856, 86th Cong. 2d Sess. *reprinted in* 1960 U.S. Code Cong. and Ad. News 2, 3623 (emphasis added). The estimated savings in public assistance funds was to be $28 million, *id.*

An examination of the Supplemental Security Income provisions and the legislation of the 1972 Social Security amendments also reveals congressional intent to protect the interest of the nation's cities and other local governments. The Social Security Income program was enacted in 1972 to provide a uniform federal cash assistance grant for the indigent, aged, blind and disabled. Congress simultaneously repealed federal-state programs which gave cash assistance to the abovementioned people at state option with a partial state-local financial contribution. Unlike SSDI which is a disability insurance program for former workers who had paid sufficient contributions into a Disability Trust Fund, SSI is a disability program with the same disability standards but for poor, disabled people without a sufficient prior work record to qualify for SSDI. When the 1972 Social Security amendments were being debated on the floor of the House of Representatives, Rep. Wilbur Mills, Chairman of the Committee on Ways and Means spoke at length on the purpose behind the proposed changes. "Look at what is happening, look what has threatened to happen, in most of the legislative bodies of our states with respect to these ever increasing costs and the possibility of ever increasing cuts in the state benefits established by members of state legislatures." 117 Cong. Rec., H21090 (June 21, 1971) (statement of Rep. Mills).

Later in the debates, Chairman Mills made a statement promising even greater benefits to cities:

> I would like to detail for the members of the fiscal impact of the assistance programs in the bill. In the first year of the new assistance programs, $5.5 billion more in federal money would be spent than would be spent under present law. Of these new costs, $1.6 billion represents *fiscal relief for state and local governments,* and, therefore, fiscal relief for state and local taxpayers. 117 Cong. Rec. H21092 (June 21, 1971) (statement of Rep. Mills) (emphasis added)

There also are references in the report of the Ways and Means Committee submitted to the House regarding the Social Security amendments. One reference under the heading, "The Need for Welfare Reform," spoke of the costs of the welfare system as it then operated: "As the costs of supporting [broken families] soar, *all levels of government* have been confronted with different fiscal problems." House Comm. on Ways and Means H. Rep. No. 92-231, 92nd Cong., 2d Sess. *reprinted in* 1971 U.S. Code Cong. and Ad. News 2, 4990 (emphasis added). Later in the same report, under the heading, "State Supplementation and Fiscal Relief," one of the purposes of the bill was stated in the following terms: "the bill would

provide for federal administration of optional state supplementation and very *substantial fiscal relief to the states and localities.*" House Comm. on Ways and Means, H. Rep. No. 92-231, 92nd Cong. 2d Sess. *reprinted in* 1972 U.S. Code Cong. and Ad News 3, 4992. (emphasis added).

Finally the report included a table detailing the "Estimated Savings in Welfare Expenditures for State and Local Governments under H.R. 1, Fiscal Year 1973." It was estimated that the state and local governments of New York would realize a savings of $188.4 million in fiscal 1973 and other state and local governments across the nation would realize over $1.5 billion for that fiscal year. House Committee on Ways and Means, House Rep. No. 92-231, 92nd Cong. 2d Sess. *reprinted in* 1972 U.S. Code Cong. and Ad. News 3, 5202.

These statements in the Congressional Record and entries in the House Report demonstrate the intention of Congress to relieve cities of much of the soaring costs of the existing public assistance programs and to shift financial responsibility for the needy, elderly and disabled to the federal government.

II. CITIES HAVE SUFFERED SERIOUS FINANCIAL INJURY RESULTING FROM THE DEFENDANT SECRETARY'S UNLAWFUL INTERNAL POLICY IN DETERMINING THE CLAIMS FOR BENEFITS OF SEVERELY MENTALLY ILL INDIVIDUALS.

The District Court found that New York State and the City of New York suffered severe economic injury in having to meet the needs of those people either removed from the disability rolls or initially denied benefits by the Secretary's policy. With respect to these injuries, the district court stated:

> Their [State and City] shelter programs, welfare systems, and hospitals have been burdened. The project coordinator for an SSI outreach program in the City Shelter program for the homeless estimated that 40% of those housed in the shelters had been denied or terminated from SSI or SSD benefits. . . .
>
> A study by the New York State Department of Social Services estimated that if 85% of those terminated from Social Security in 1982 applied for public assistance, a 26.9 million increase in annual expenditures would be expected of which the state and local governments would bear a substantial portion. The same study estimated that 33% of those terminated had been receiving benefits for a mental disability. 578 F. Supp. 1119.
>
> Dr. Francine Cournos is a psychiatrist employed as a medical officer at the New York City Regional Office for the New York State Office of Mental Health. At the trial, Dr. Cournos sketched the extent of the financial costs the New York City Department of Social Services incurred as a result of the Secretary's illegal actions. She testified that 90 percent of the people she observes have a history of state psychiatric hospitalization, three fourths of whom are patients seen on an outpatient or inpatient basis, although most eventually remain at inpatient status. These people are at the most seriously mentally ill levels. Dr. Cournos testified that 90 percent of all patients at New York City's Regional Office receive some form of governmental assistance.
>
> In a study by her office conducted annually, it was determined in 1981 that out of 705 patients reviewed, 44 percent received SSI benefits and 33 percent were on state and local public assistance welfare. The following year,

those percentages were reversed: 35 percent had been granted Social Security Income benefits while 44 percent received welfare assistance. Thus, while the patient population remained unchanged, beginning in 1981, the number of patients receiving federal benefits decreased and the number of patients receiving benefits from New York State and City welfare programs increased. These trends are attributed to increased denials and terminations from SSI benefits. Dr. Cournos also testified that her office assists the mentally ill patient in pursuing his claim through the Social Security Administration process. Dr. Cournos estimated that its costs the New York City Regional Office $1,000 in staff time to help a mentally ill patient pursue an appeal of a denial of benefits to the level of an administrative law hearing which excludes the time later spent by the psychiatrist with a patient that mentally or emotionally has deteriorated from the appeals process. [Trial Tr. pp. 481-506]

The unlawful denials and termination of Social Security and SSI benefits have resulted in increased welfare costs to city governments throughout the country. How many chronically mentally ill are there? It is estimated that there are 1,100,000 schizophrenics in America, 18,000 among them are in hospitals and almost a million in the community. Combined with estimates of elderly and other types of severely mentally disabled patients, the total is between 2 and 4 million.[2] In 1983, it is estimated that county governments spent over 2 billion in health and welfare services.[3]

[2]Dr. John A. Talbott, "Toward a Public Policy on The Chronic Mentally Ill Patient," 50 American Journal of Orthopsychiatry 44 (Jan. 1980)

[3]"Social Security Reviews of The Mentally Disabled, 1983: Hearings Before The Special Comm. on Aging," S. Hrg. 98-170, 98th Cong., 1st Sess. 83 (1983) (Statement of Louis O. Treadway, National Association of Counties).

Orange County, Florida (pop. 500,000) spent in 1982 $8.9 million on Social Service welfare programs of which $5.7 million was a direct impact on the county's general fund in taxation representing the county's primary source of revenue.[4] Denials of mentally disabled applicants of SSI cost Orange County approximately 19% of its $5.7 million in unreimbursed health and welfare services,[5] a huge percentage of local expenditure misapplied to an area of primarily federal responsibility.

Many cities and counties are not equipped to step in and provide for all the needs of mentally disabled persons when federal assistance is disrupted. For those who are equipped, the burden of local assistance which they must bear represents a shift of federal fiscal responsibility to city or county budgets which is intolerable given the fiscal condition of cities and counties today. It cost Washington D.C. $20,000 to $25,000 annually in 1980 to keep a patient at St. Elizabeth's Hospital while community placements at that time ran $2,600 to $3,200. The latter sum comes almost entirely from SSI checks delivered directly to group homes.[6] Without these checks, the District must bear this significant burden on its social welfare resources already strained by rising costs.

In Pennsylvania, people who are reviewed and who lose their SSI/SSDI benefits apply for and receive General Assistance. From March 1981 through August, 1982, the State Disability unit terminated benefits to 13,205 SSDI beneficiaries representing a termination rate of 42 percent. A total of 16,494 SSI beneficiaries were terminated benefits for a termination rate of 77 percent at the initial perio-

[4]Id., p. 98.

[5]Id., p. 84.

[6]Mary Ellen Hombs and Mitch Snyder, *Homelessness in America*, Community for Creative Non-Violence, p. 5 (1982).

dic review decision level. Overall, 19,749 SSDI/SSI terminated individuals turned to Pennsylvania for General Assistance. At this rate, the cost to Pennsylvania of all these terminated beneficiaries who apply for and receive General Assistance as chronically needy was estimated at $40,761,936 each year. These costs escalate rapidly if denials of new applications for SSI/SSDI are considered. From March 1981 to August 1982, the Social Security Administration denied 33,980 initial applications for SSI in Pennsylvania. If 75 percent of these people then applied for and received General Assistance as chronically needy, it would cost the state $52,610,040 each year for these beneficiaries.[7] These figures in Pennsylvania, of course, affect all local government budgets as well as those of the state.

In Michigan, artificially low SSI and SSDI approval rates exerted a substantial impact on the budgets of state and local governments. About 2½ percent of the state population receives SSI or SSDI benefits equaling approximately $1.026 billion per year. Estimates based on small samples indicate that 30 percent of the applicants denied federal benefits will become dependent on state General Assistance or Aid to Families with Dependent Children (AFDC), forcing the state to replace $123 million in benefit payments which rightfully should have been paid from federal funds.[8]

[7]"Hearing," supra, note 2, p. 253 ("Financial Impact on Pennsylvania and Philadelphia on Termination and Denials of Benefits to SSI/SSDI Applicants and Recipients" prepared by the Mental Health Assn. of Southwestern Pennsylvania).

[8]Id., p. 291 ("The SSI/SSDI Disability Controversy: How and Why The Social Security Administration Has Reduced the Number of SSI/SSDI Beneficiaries," prepared by the State of Michigan Interagency Task Force on Disability, 1983).

In addition to the abovementioned expenditures, there are other costs which cities and other local governments must bear, the precise figures for which are not readily ascertainable. The mentally ill particularly are vulnerable to bureaucratic oversight and error, and most often they are unable to protect their own interests. Many of these individuals terminated from or denied Social Security benefits are without vocational training and are unable to live independently. Frequently, many who do not seek General Assistance following a denial or termination of SSI or Social Security benefits turn up in jails, prisons, state hospitals and shelters for the homeless, of which local governments and cities must pick up the costs. Others, not so fortunate, just end up on the streets, back alleys, parks, vacant lots and abandoned buildings. At least one-third to one half of these "street people" are ex-mental patients who pose a danger not only to themselves but to the citizens and communities in which they exist.[9] There can be no doubt that the existence of many of these people on the streets resulted from the Secretary's illegal arbitrary assessment practices during the eligibility determination process.

CONCLUSION

The procedural illegality by the Secretary of Health and Human Services in denying mentally ill applicants for and recipients of Social Security and SSI benefits a proper determination of their eligiblity harmed these applicants as well as injured the financial integrity of city treasuries throughout the nation. Congress enacted the Social Security Act and its amendments in part) to relieve these treasuries of the entire burden of providing assistance to

[9]*Homelessness*, p. 44.

the nation's disabled. The argument that the remedy provided by the district court would administratively inconvenience the Social Security Administration pales before the need to make these injured applicants whole and to relieve city governments of the costs that Congress intended to alleviate. Therefore, the National Institute of Municipal Law Officers urges this Court to affirm the decision below.

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AMICUS CURIAE

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,

Petitioners,

v.

CITY OF NEW YORK, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENTS OF ALABAMA, ARKANSAS, FLORIDA, HAWAII, ILLINOIS, IOWA, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, SOUTH DAKOTA, TEXAS, WEST VIRGINIA, WISCONSIN, AND WYOMING

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The States file this Brief *Amicus Curiae* pursuant to Supreme Court Rule 36.4 which provides for filing such a brief without consent of the parties.

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Doe v. Heckler, 568 F. Supp. 681 (D. Md. 1983) . 4

Holden v. Heckler, 584 F. Supp. 463 (N.D. Ohio 1984) 4

Minnesota Mental Health Association v. Schweiker, 554 F. Supp. 157, *aff'd*, 720 F.2d 965 (8th Cir. 1983) 8,12,13

Federal Statutes and Regulations

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Tit. II, 42 U.S.C. §§ 401, *et seq.*

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Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794, *et seq.*	
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Part 416	
§§ 416.1001, *et seq.*	2
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117 Cong. Rec. H21090, H21092 (June 21, 1971)	5
House Comm. on Ways and Means, Rep. No. 92-231, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Adm. News 4990, 4992, 5202	4,5
Disability Amendments of 1982: Hearings Before the Subcomm. on Social Security of the House Ways and Means Comm., 97th Cong., 2d Sess. (March 16 and 17, 1982) [hereinafter cited as *March 16 and 17, 1982 House Ways and Means Comm. Hearing*]	8,9,25
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Council of State Administrators of Vocational Rehabilitation at 156 25

Impact of the Accelerated Review Process on Cessations and Denials in the Social Security Disability Insurance Program: A Report by the Chairman of the House Select Comm. on Aging, 97th Cong., 2d Sess. 40 (Oct. 1982) [hereinafter cited as *October, 1982 House Aging Comm. Report*] 10,11,22

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Office of the New York City Council President, *Passing the Buck: Fèderal Efforts to Abandon the Mentally Disabled* (Jan. 1982) at 76, 85, 86 22

Oversight of the Social Security Administration Disability Reviews: A Report Prepared by the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, 97th Cong., 2d Sess. (August, 1982) 10

Social Security Disability Benefits Terminations: New York: Hearing Before the Subcomm. on Retirement Income and Employment of the House Comm. on Aging, 97th Cong., 2d Sess. (July 19, 1982) [hereinafter cited as *July 19, 1982 House Aging Comm. Hearing*] 12,14,17, 20,21,25

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New York State Department of Social Services Division of Operations Bureau of Operations Analysis, *Accelerated Continuing Disability Investigation Cessations: A Characteristics Profile of Affected Persons* (July, 1982) at 177, 208 ..... 14,20,21, 25

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Social Security Disability: Boston, Mass.: Hearing Before the Subcomm. on Retirement Income and Employment of the House Aging Comm., 98th Cong., 1st Sess. (May 31, 1983) 16,27

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Social Security Disability Insurance: Hearing Before the Subcomm. on Social Security of the House Ways and Means Comm., 98th Cong., 1st Sess. (June 30, 1983) 7,8,11, 12,14,16, 25

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Social Security Disability Insurance Program: Cessations and Denials: Hearing Before the House Aging Comm., 97th Cong., 2d Sess. (May 21, 1982) [hereinafter cited as *May 21, 1982 House Aging Comm. Hearing*] 11,15, 24,27

Statement of Witness and Documents

Francine Cournos, M.D. and Richard Herman, "A Federal 'Shell Game' on Mental Disability," Letter to the Editor, *New York Times* (Feb. 11, 1982) at 254, 255 24

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Study Group on Social Security, *Current Administration of Social Security Disability Programs: Rational Goals, Inadequate Methods, and Irrational Results* (May 28, 1982) at 159, 162 15,27

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Social Security Disability Program: A Briefing by the Subcomm. on Retirement Income and Employment of the House Select Comm. on Aging, 98th Cong., 1st Sess. (Sept. 12, 1983) .. 13,16

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Social Security Disability Reviews: A Federally Created State Problem: Hearing Before the House Comm. on Aging, 98th Cong., 1st Sess. (June 20, 1983) [hereinafter cited as *June 20, 1983 House Aging Comm. Hearing*] 10,11,14, 20,21,22, 25,27

Statements of Witnesses and Documents

HHS Fact Sheet: Reforming the Disability Review Process (June 7, 1983) at 526, 527 10

State of Michigan Interagency Task Force on Disability, *The SSI/SSDI Disability Controversy: How and Why the Social Security Administration Has Reduced the Number of SSI/SSDI Beneficiaries* (April, 1983) at 544 .... 10,20,22, 25

National Association of Counties at 607 21,22

Robert Pear, *Fairness of Reagan's Cutoffs of Disability Aid Questioned, New York Times*, May 9, 1982, at 1, col. 1 at 448, 449 10

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Rep. Ike Skelton at 8 27

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Social Security Disability Reviews: The Human Costs: Hearing Before the Senate Special Comm. on Aging, 98th Cong., 2d Sess. (Feb. 16, 1984) at 52 19

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Social Security Disability Reviews: The Human Costs: Joint Hearing Before the Senate Special Comm. on Aging and the Subcomm. on Social Security of the House Ways and Means Comm., 98th Cong., 2d Sess. (Feb. 17, 1984) .. 10,22

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Mental Health Association of Southeastern Pennsylvania, *Financial Impact on Pennsylvania and Philadelphia on Terminations and Denials of Benefits to SSI/SSDI Applicants and Recipients* at 253-54 21,23

New York State Department of Social Services Commissioner Cesar A. Perales at 89 24

Status of Continuing Disability Reviews: Hearing Before the Subcomm. on Social Security of the House Comm. on Ways and Means, 98th Cong., 2d Sess. (March 23, 1984) 24

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Vermont's Response to the Federal Social Security Disability Review Program: Hearing Before the Subcomm. on Retirement Income and Employment of the House Comm. on Aging, 98th Cong., 1st Sess. (July 22, 1983) 12,13

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S. Rep. No. 2133, 84th Cong., 2d Sess. (1956), *reprinted in* 1956 U.S. Code Cong. & Adm. News 3880 3

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S. Rep. No. 1856, 86th Cong., 2d Sess. (1960), *reprinted in* 1960 U.S. Code Cong. & Adm. News 3623 4

Department of Health and Human Services Documents

Dept. of Health and Human Services Office of Ass't Sec'ty for Planning and Evaluation, *Characteristics of General Assistance Programs* (May, 1983) 19

HHS Fact Sheet: Reforming the Disability Review Process (June 7, 1983), *reprinted in June 20, 1983 House Aging Comm. Hearing* at 526, 527 10

SSA Program Operations Manual System § DI 01003.030 8

Other Authorities

A. Books

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 27 (Third Edition) March, 1981 16

David and Sheila Rothman, *The Willowbrook Wars: A Decade of Struggle for Social Justice* (1984) 16

B. Pamphlets

State of Connecticut Office of Protection and Advocacy for Handicapped and Developmentally Disabled Persons, *SSI and OASDI Redeterminations of Mentally Disabled People* 9 (Summer, 1982) 23,24

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Developmental Disabilities Law Center, Inc. (Boston, Mass.), *Cost/Benefit Analysis of the Disability Benefits Project* 13 (March, 1985) ... 23,26

Mental Health Association of Southeastern Pennsylvania, *Financial Impact on Pennsylvania and Philadelphia on Terminations and Denials of Benefits to SSI/SSDI Applicants and Recipients, reprinted in April 7 and 8, 1983 Senate Aging Comm. Hearing* at 253-54 .. 21,23

State of Michigan Interagency Task Force on Disability, *The SSI/SSDI Disability Controversy: How and Why the Social Security Administration Has Reduced the Number of SSI/SSDI Beneficiaries* (April, 1983), *reprinted in June 20, 1983 House Aging Comm. Hearing* at 544 ..... 10,20, 22,25

Office of the New York City Council President, *Passing the Buck: Federal Efforts to Abandon the Mentally Disabled* (Jan. 1982), *reprinted in October, 1982 House Aging Comm. Report* at 76, 85-86 22

New York State Department of Social Services Division of Operations Bureau of Operations Analysis, *Accelerated Continuing Disability Investigation Cessations: A Characteristics Profile of Affected Persons* (July, 1982), *reprinted in July 19, 1982 House Aging Comm. Hearing* at 177, 208 ..... 14,20, 21,25

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Study Group on Social Security, *Current Administration of Social Security Disability Programs: Rational Goals, Inadequate Methods, and Irrational Results* (May 28, 1982), *reprinted in May 21, 1982 House Aging Comm. Hearing* at 159, 163 15,27

C. Memorandum

Sandor Berendi, M.D., Medical Advisor for the Chicago SSA Regional Office, *Medical Consultant Comments, reprinted in March 16 and 17, 1982 House Ways and Means Comm. Hearing* at 109 8

D. Newpaper Articles

Francine Cournos, M.D. and Richard Herman, "A Federal 'Shell Game' on Mental Disability," Letter to the Editor, *New York Times* (Feb. 11, 1982), *reprinted in May 21, 1982 House Aging Comm. Hearing* at 254, 255 24

Robert Pear, *Fairness of Reagan's Cutoffs of Disability Aid Questioned, New York Times*, May 9, 1982, at 1, col. 1, *reprinted in June 20, 1983 House Aging Comm. Hearing* at 448, 449 10

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Affidavit of William C. Copeland prepared in support of State of Illinois' intervention, *Young v. Heckler*, Case No. 83-5321 (S.D. Ill. 1984) .. 20,23,26

Letter from Robert Cohen, Director of Wisconsin Bureau of Social Security Disability Insurance, to SSA Ass't Regional Commissioner Ollie Washington, dated December 29, 1981, *reprinted in March 16 and 17, 1982 House Ways and Means Comm. Hearing* at 103 9

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Letter from John Carlin, Governor of Kansas, to Rep. Edward R. Roybal, dated Feb. 24, 1984, *reprinted in February 28, 1984 House Aging Comm. Hearing* at 96 13

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BRIEF *AMICUS CURIAE*

INTERESTS OF THE *AMICI CURIAE* AND SUMMARY OF ARGUMENT

Every State has a strong economic interest in assuring that the Social Security Administration complies with all applicable federal laws in administering the federal disability programs. As is discussed in detail below, a primary congressional purpose in establishing those programs was to relieve State and local governments of their public assistance costs for disabled persons. Despite this clear intent, the Social Security Administration ["SSA"] adopted the mental disability policy challenged

herein which resulted in substantial human and economic costs to the States, localities and to their disabled populations.

SSA's application of this policy, which the agency itself now concedes violated the Social Security Act and the federal regulations, resulted in the wrongful denial and/or termination of Social Security Disability ["SSD"] and Supplemental Security Income ["SSI"] disability benefits to tens of thousands of truly disabled persons. Many of these claimants suffered medical decompensation, rehospitalizations, suicides, family break-ups, loss of homes and possessions and other equally irremediable and unwarranted hardships.

In addition, since many of these mentally disabled individuals had no other source of income, the loss or denial of SSD and/or SSI benefits forced them to seek State, local and private forms of assistance for shelter, food, medical care and other basic necessities of life. This increased demand for assistance resulted in a shift of a significant portion of the federal cost for the care of the disabled to the State and local governments, in direct contravention of congressional intent. The resulting heavy economic burden on the States will continue until SSA is required to review the prior adverse decisions and restore the truly disabled to federal benefits, thereby ending their dependence on State and locally-funded public assistance.

A second and equally substantial interest of all States relates to their contractual responsibility for making the first determinations regarding initial and continuing disability for purposes of eligibility for SSD and SSI benefits. 42 U.S.C. §§ 421(a)(1) (SSD); 1383b(a) (SSI); 20 C.F.R. §§ 404.1601, *et seq.*; 416.1001, *et seq.* Federal law mandates that, in making those determinations the State Disability Determination Services ["DDS's"] apply all applicable federal statutory and regulatory authority, as well as unpublished internal SSA instructions. 42 U.S.C. §§ 421(a)(1), 421(b). If, upon its mandatory review of State agency disability determinations, SSA finds evidence of non-compliance with such applicable authority, SSA can impose severe financial sanctions or even assume administration of the program. 42 U.S.C. §§ 421(b)(1); 421(c)(1); 421(c)(3)(C).

SSA's adoption of the invalid mental disability policy placed the States in an untenable position: If the States complied with SSA's undisclosed rule, they would violate the Social Security Act and implementing federal regulations. However, if the States refused to apply SSA's rule, they risked the imposition of severe sanctions, including loss of administrative control of the program and federal reimbursement for processing costs. The States did apply the improper policy but also advocated for a change through the administrative channels available to them. Nevertheless, SSA continued to require the States to apply the invalid policy.

The *amici* States submit this brief to detail the substantial economic and human costs, as well as the administrative burdens, they and their disabled citizens wrongly bore as a result of the policy challenged herein. On the basis of these interests as well as the States' strong and continued concern that the individual plaintiffs injured by SSA's improper rule receive new reviews of their cases with application of proper policies, the *amici* States urge that this Court uphold the decision below.

INTRODUCTION

CONGRESS ESTABLISHED THE FEDERAL DISABILITY PROGRAMS IN PART TO RELIEVE STATE AND LOCAL GOVERNMENTS OF THEIR PUBLIC ASSISTANCE COSTS FOR THE CARE OF THE DISABLED.

Prior to the establishment of the Social Security Disability Insurance program in 1956, the total burden of caring for the needy disabled rested on State, local, and private sources. Initially, the SSD program provided benefits only to disabled workers age 50 years and over. But even as to these persons, a Senate Report noted that many of the disabled had relied on "State and local general assistance programs." S. Rep. No. 2133, 84th Cong., 2d Sess. (1956), *reprinted in* 1956 U.S. Code Cong. & Adm. News 3880. The same congressional intent was evident in the enactment in 1960 of an

amendment repealing the age limitation for receiving SSD benefits. In its Report of that bill, the Senate Finance Committee stated, "Many [of the disabled] who would be eligible for disability benefits except for the age limitation are now receiving payments under the public assistance programs. *With insurance benefits available to them and their dependents, some of these individuals would no longer need assistance payments.*" S. Rep. No. 1856, 86th Cong., 2d Sess. (1960), *reprinted in* 1960 U.S. Code Cong. & Adm. News 3623 [emphasis added]. The Committee also reported an estimated savings from the bill in State and local public assistance monies of $28 million. *Id.*

As the legislative history demonstrates and as various courts have recognized,[1] one of the principal congressional reasons for establishing the federal SSI program in 1972 was to relieve State and local governments of the costs of caring for the elderly and disabled. The SSI program provided a uniform federal cash assistance grant for the indigent aged, blind and disabled, replacing existing federal/state programs which provided cash assistance to these same categories of people at State option, and with a partial State/local financial contribution. 42 U.S.C. §§ 1381, *et seq*. The House Report which accompanied the 1972 legislation focused on the rising costs to State and local governments of caring for the elderly and disabled. Under the heading, "The Need for Welfare Reform," the Committee noted: "[A]s the costs of supporting (broken families) soar, *all levels of government* have been confronted with difficult fiscal problems." House Comm. on Ways and Means, Rep. No. 92-231, 92d Cong., 2d Sess. ("1972 House Report"), *reprinted in* 1972 U.S. Code Cong. & Adm. News 4990 (emphasis added). Later in the same report, under the heading, "State Supplementation and Fiscal Relief," the Committee stated that: "[T]he bill would provide...*very substantial fiscal relief to*

[1] *City of New York v. Heckler*, 578 F. Supp. 1109, 1121 (1984); *Dixon v. Heckler*, 589 F. Supp. 1512, 1516 (S.D.N.Y. 1984); *Holden v. Heckler*, 584 F. Supp. 463, 481 (N.D. Ohio 1984); *Avery v. Heckler*, 584 F. Supp. 312, 316 (D. Mass. 1984). *See also Doe v. Heckler*, 568 F. Supp. 681, 683 (D. Md. 1983) (Distinguishes SSD from SSI program, recognizing that latter is a federally-funded disability benefits program replacing state-administered programs).

the States and localities." 1972 House Report, *reprinted in* 1972 U.S. Code Cong. & Adm. News 4992 (emphasis added).[2] Finally, the 1972 House Report included a table detailing the "Estimated Savings in welfare expenditures for State and local governments under H.R. 1, fiscal year 1973" as $1.644 billion nationally. 1972 House Report, *reprinted in* 1972 U.S. Code Cong. & Adm. News 5202.[3]

[2] Further evidence of this purpose is found in the provisions of the Social Security Act authorizing the Secretary to contract with States for federal administration of the optional State SSI Supplementation program, 42 U.S.C. § 1382e, and for federal determination of eligibility for Medicaid, 42 U.S.C. § 1383c. In addition, the Social Security Act permits States to obtain reimbursement for General Assistance payments made to some SSI applicants from their first retroactive SSI payment under some circumstances. 42 U.S.C. § 1383(g).

The congressional intent to relieve State and local governments of their public assistance costs extended to other types of services. *See* 42 U.S.C. § 1382d (requiring federal reimbursement of States' costs for providing rehabilitation services to blind and disabled persons) and 42 U.S.C. § 1382i (establishing medical and social services pilot programs for certain other handicapped individuals).

[3] *See also* the statements on the floor of the House of Representatives by Rep. Wilbur Mills, Chairman of the Committee on Ways and Means:

> Look at what is happening, look what has threatened to happen, in most of the legislative bodies of our States with respect to these ever-increasing costs and the possibility of ever-increasing cuts in the State benefits established by members of State legislatures." 117 Cong. Rec. H21090 (June 21, 1971).

Shortly thereafter, Chairman Mills described the fiscal relief that the new federal program would provide to State and local governments:

> I would like to detail for the members the fiscal impact of the assistance program in the bill. In the first year of the new assistance programs, $5.5 billion more in federal money would be spent than would be spent under present law. Of these new costs, $1.6 billion represents *fiscal relief for state and local governments* and, therefore, fiscal relief for State and local taxpayers. 117 Cong. Rec. H21092 (June 21, 1971) (emphasis added).

The clear congressional intent in enacting the SSD and SSI programs was to relieve the State and local governments of public assistance costs for the care of the disabled. Despite this intent, SSA adopted certain policies, including the mental disability policy invalidated herein, which largely resulted in a shifting of these costs back to the State and local governments.

ARGUMENT

I. SSA REQUIRED THE STATES TO APPLY THE MENTAL DISABILITY POLICY WHICH VIOLATED THE SOCIAL SECURITY ACT AND RESULTED IN INCORRECT DENIALS AND TERMINATIONS OF DISABILITY BENEFITS.

A. *SSA Implemented the Invalid Policy Through Case Returns to State DDS's.*

As discussed above, State DDS's make the initial disability determinations and, in doing so, are required to apply all applicable federal policies. 42 U.S.C. §§ 421(a)(1), 421(b). SSA transmits these standards to the States through regulations, Rulings, policy statements, Program Circulars, State Agency Memoranda from the Regional SSA Offices, the Program Operations Manual System manual, Informational Digests, teletypes, correspondence, and federal returns of DDS decisions.* States have no choice but to comply with all these federal policies since they are subject to severe administrative and financial sanctions for any non-compliance. 42 U.S.C. §§ 421(b)(1); 421(c)(1); 421(c)(3)(C).

It has been undisputed throughout the course of this lawsuit that SSA never published the invalid mental disability policy in the Federal Register; it never included the policy in SSA manuals available to the public; and it never mailed claimants any individual written notice of the reason for the adverse action taken

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* If SSA determines upon its mandatory review of DDS disability determinations in individual cases that the State did not apply applicable federal policies, SSA "returns" the case to the State agency with instructions to render a new decision or take other action. The United States General Accounting Office ["GAO"] has acknowledged that State DDS personnel study SSA returns to determine if they reflect new disability evaluation policies. *Social Security Disability Insurance: Hearing Before the Subcomm. on Social Security of the House Ways and Means Comm.*, 98th Cong., 1st Sess. 122, 125 (June 30, 1983) [hereinafter cited as *June 30, 1983 House Ways and Means Comm. Hearing*] (Statement of Peter J. McGough, Associate Director, Human Resources Division, GAO). In this way, States attempt to avoid making errors which can lead to SSA's imposition of administrative sanctions.

in their cases.[5] Rather, the invalid mental disability policy was disseminated to the States first through SSA case returns. As early as 1978, SSA began returning to some States, including New York, Massachusetts, Utah, and Wisconsin, the cases of mentally disabled persons the States had found disabled on medical/ vocational grounds.[6] SSA's instructions accompanying these cases informed those States that mentally disabled persons who did not "meet" or "equal" the Listing of Impairments[7] were presumed able to

[5] Notices of adverse action included language drafted by SSA and the States were not permitted to modify those notices. *See, e.g.*, SSA Program Operations Manual Systems § DI 01003.030.

[6] *See June 30, 1983 House Ways and Means Comm. Hearing* at 126 (Statement of Peter J. McGough (GAO)). *See also Minnesota Mental Health Association v. Schweiker*, 554 F. Supp. 157, 163 (D. Minn. 1982), *aff'd*, 720 F.2d 965 (8th Cir. 1983); *City of New York*, 578 F. Supp. at 1115-16.

[7] 20 C.F.R. Part 404, Subpt P, App. 1. Even SSA's own medical advisors believed that the Listing of mental impairments deemed disabling was overly restrictive:

> Only a negligible number of new applicants are allowed, as it is practically impossible to meet [mental] Listing 12.04 for any individual whose thought processes are not completely disorganized, is not blatantly psychotic, or is not having a psychiatric emergency requiring immediate hospitalization. In fact, an individual may be commitable due to mental illness according to the States' Mental Health Codes and yet found capable of 'unskilled work' utilizing our disability standards.

Sandor Berendi, M.D., Medical Advisor for the Chicago SSA Regional Office, *Medical Consultant Comments, reprinted in Disability Amendments of 1982: Hearings Before the Subcomm. on Social Security of the House Ways and Means Comm.*, 97th Cong., 2d Sess. 109 (March 16 and 17, 1982) [hereinafter cited as *March 16 and 17, 1982 House Ways and Means Comm. Hearing*]. In addition, according to a GAO study, these Listings were applied incorrectly, with claimants being denied benefits on the basis of their being able to perform minimal daily activities. *June 30, 1983 House Ways and Means Comm. Hearing* at 124 (Statement of Peter J. McGough (GAO)). These problems led Congress to require SSA to issue more realistic mental disability policies. Social Security Disability Benefits Reform Act of 1984, P.L. No. 98-460, § 5.

do unskilled labor and hence should be found not disabled. In objecting to these returns, the Wisconsin DDS Director stated, "The current adjudicative climate involving mental impairments seems to be one of deny, deny, deny."[8]

B. *The Adverse Impact of SSA's Improper Mental Disability Policy was Increased Substantially as a Result of the Periodic Continuing Disability Investigation Program.*

The Periodic Continuing Disability Investigation ["PCDI"] program, which was established by 1980 legislation, required SSA to review the continuing disability of persons deemed to have non-permanent impairments once every three years. 42 U.S.C. § 421(h). Contrary to congressional intent, SSA implemented the PCDI program in such a way that it caused arbitrary terminations of benefits for tens of thousands of disabled persons, especially the mentally disabled. Specifically, SSA unilaterally accelerated the implementation of the PCDI program in March, 1981 (rather than the January, 1982 date directed by Congress, Pub. L. No. 96-265, § 311(b)), vastly increased the numbers of cases involving all types of impairments that the States were required to review, without providing sufficient time for advance training[9]

[8] Letter from Robert Cohen, Director of Wisconsin Bureau of Social Security Disability Insurance, to SSA Assistant Regional Commissioner Ollie Washington, dated December 29, 1981, *reprinted in March 16 and 17, 1982 House Ways and Means Comm. Hearing* at 103.

[9] According to the Tennessee Disability Determination Section Director, "... literally thousands of these accelerated cases were dumped on the States 9 months early with only a telephone call a week before they started arriving. No advance notice to us, the beneficiaries, the public, no one." *Social Security Disability Program Reform: Hearings Before the Senate Budget Comm.*, 98th Cong., 2d Sess. 128 (March 16, 1984) (Statement of Herbert L. Brown, Director, Disability Determination Section, Tennessee Department of Human Services).

or federal resources,[10] and imposed strict time limits and quality rates for case processing by the DDS's. SSA has admitted that the vastly increased workload rendered the review procedures "... overly-bureaucratic and sometimes insensitive..."[11] and that incorrect determinations were made.[12]

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[9] Nationally, CDI caseloads increased by 19,122% between 1975 and 1982 with only a 24% increase in staff. *Impact of the Accelerated Review Process on Cessations and Denials in the Social Security Disability Insurance Program: A Report by the Chairman of the House Select Comm. on Aging*, 97th Cong., 2d Sess. 40 (Oct. 1982) [hereinafter cited as *October, 1982 House Aging Comm. Report*]. As a Congressional Report stated:

> Without sufficient time, staffing, or resources, State agencies were forced to process far too many CDI's, far too quickly. ... The simple increase in volume from a routine 160,000 reviews per year to roughly 500,000 CDI's in fiscal year 1985, in and of itself accounts for a major dimension of this problem. The phasein period was much more rapid than intended by Congress, and State agencies sacrificed thoroughness and accuracy to speed and efficiency.

Social Security Disability Reviews: The Human Costs: Joint Hearing Before the Senate Special Comm. on Aging and the Subcomm. on Social Security of the House Ways and Means Comm., 98th Cong., 2d Sess. 58 (Feb. 17, 1984) [hereinafter cited as *February 17, 1984 Joint Hearing*].

[10] *HHS Fact Sheet: Reforming the Disability Review Process* (June 7, 1983), *reprinted in Social Security Disability Reviews: A Federally Created State Problem: Hearing Before the House Comm. on Aging*, 98th Cong., 1st Sess. 526, 527 (June 20, 1983) [hereinafter cited as *June 20, 1983 House Aging Comm. Hearing*].

[11] Robert Pear, *Fairness of Reagan's Cutoffs of Disability Aid Questioned*, *New York Times*, May 9, 1982, at 1, col. 1, *reprinted in June 20, 1983 House Aging Comm. Hearing* at 448, 449. *See generally Oversight of the Social Security Administration Disability Reviews: A Report Prepared by the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs*, 97th Cong., 2d Sess. (August, 1982); State of Michigan Interagency Task Force on Disability, *The SSI/SSDI Disability Controversy: How and Why the Social Security Administration Has Reduced the Number of SSI/SSDI Beneficiaries* (April, 1983) [hereinafter cited as Michigan Interagency Task Force Report], *reprinted in June 20, 1983 House Aging Comm. Hearing* at 544.

The adverse effects of SSA's implementation of the PCDI program were especially harsh for the mentally disabled. That is because between June, 1981 and June 7, 1983, SSA selected cases for PCDI reviews through use of twenty "profiles"[13] which, as SSA has admitted, resulted in a proportionately higher percentage of mentally impaired persons being selected to undergo continuing disability reviews[14] and be subjected to SSA's improper mental disability policy. Indeed, statistics show that while persons with mental impairments comprised but 11.3% of the disability rolls as a whole, they were terminated at a rate of 28.6%, a greater termination rate than that for any other impairment.[15]

C. *States Pursued the Administrative Channels Available to Obtain a Modification of the Invalid Policy.*

The States were not responsible for this situation because, as stated above, they were required to and did comply with SSA's invalid policy.[16] The result was that States were forced to deny

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[13] The profiles were based on the claimant's age, level of benefits, length of time on disability, entitlement date, number and type of beneficiaries, and age at filing. *Social Security Disability Insurance Program: Cessations and Denials: Hearing Before the House Aging Comm.*, 97th Cong., 2d Sess. 90 (May 21, 1982) [hereinafter cited as *May 21, 1982 House Aging Comm. Hearing*] (Statement of John D. Harris, President, National Council of Social Security Administration Field Operations Locals).

[14] *June 20, 1983 House Aging Comm. Hearing* at 120, 127 (Statement of SSA Deputy Commissioner Paul B. Simmons). SSA also admitted that claimants with functional psychotic impairments were the most prone to receive incorrect termination decisions. *June 30, 1983 House Ways and Means Comm. Hearing* at 31 (Statement of Paul B. Simmons).

[15] *October, 1982 House Aging Comm. Report* at 42. *See generally Social Security Reviews of the Mentally Disabled: Hearings Before the Senate Comm. on Aging*, 98th Cong., 1st Sess. 12-22 (April 7 and 8, 1983) [hereinafter cited as *April 7 and 8, 1983 Senate Aging Comm. Hearing*] (Statement of Peter J. McGough (GAO)).

[16] That the States complied with SSA's rules, given the federal funding allocated to them, is demonstrated by the fact that SSA consistently gave the States high

(Continued on next page)

and terminate the SSD and/or SSI benefits of many persons they believed to be truly disabled. This situation led some States to begin questioning the mental disability policy through the administrative channels available to them. For example, the States in the Chicago SSA Region raised the issue with that SSA Regional Office. *Minnesota Mental Health Association*, 554 F. Supp. at 163, 164. In addition, the New York DDS communicated its concerns about the policy to the SSA Regional Office which agreed with the DDS. *City of New York*, 578 F. Supp. at 1116. However, the SSA Central Office overruled the Regional Office and continued to require that the invalid policy be applied. *Id.*

The States' concerns that the policy was invalid were confirmed when the Court found it violated the Social Security Act in *Minnesota Mental Health Assoc.*, 554 F. Supp. at 157. Thereafter, the States increased their efforts to have the policy modified. New York State initiated this action. Other States voiced their concerns about the mental disability policy to congressional committees reviewing the chaotic situation.[17] In addition, State officials

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quality assurance ratings. *See, e.g.*, the SSA study showing a 97.5% accuracy rate in State CDI determinations. *Social Security Disability Benefits Terminations: New York: Hearing Before the Subcomm. on Retirement Income and Employment of the House Comm. on Aging*, 97th Cong., 2d Sess. 125 (July 19, 1982) [hereinafter cited as *July 19, 1982 House Aging Comm. Hearing*] (Statement of Paul B. Simmons, SSA Deputy Commissioner).

[17] *See, e.g., Social Security Disability Reviews: A Costly Constitutional Crisis: Hearing Before the House Comm. on Aging*, 98th Cong., 2d Sess. 34, 75, 92 (Feb. 28, 1984) [hereinafter cited as *February 28, 1984 House Aging Comm. Hearing*] (Statement of Stephen H. Sachs, Attorney General of Maryland; Statement of David T. Williams, Chairman, Governor's Task Force on Disability Insurance, presented on behalf of Governor Richard F. Celeste, State of Ohio; Statement of George C. Wallace, Governor of Alabama); *June 30, 1983 House Ways and Means Comm. Hearing* at 140, 226 (Statement of Elmer C. Bartels, Commissioner, Massachusetts Rehabilitation Commission; Statement of The American Bar Association, Commission on Legal Problems of the Elderly); *Vermont's Response to the Federal Social Security Disability Review Program: Hearing Before the Subcomm. on Retirement Income and Employment of the House Comm. on Aging*, 98th Cong., 1st Sess. 16 (July 22, 1983) (Statement of Sutherland

(Continued on next page)

supported legislation imposing a moratorium on conducting continuing disability investigations, at least in the cases of claimants with mental impairments, until SSA could issue new and more appropriate policies.[18] In other States, legislative or agency task forces conducted hearings and prepared reports to outline the problems with SSA disability policies and to propose solutions.[19] The States' objections to SSA's mental disability policy were verified by a GAO report which found SSA's policy failed to include the required consideration of a mentally impaired claimant's residual functional capacity.[20]

Miller, Vermont Commissioner of Mental Health); *Social Security Disability Program: A Briefing by the Subcomm. on Retirement Income and Employment of the House Select Comm. on Aging*, 98th Cong., 1st Sess. 47, 53 (Sept. 12, 1983) [hereinafter cited as *September 12, 1983 Subcomm. on Retirement Income Briefing*] (Statement of Joseph J. Bevilacqua, Commissioner, Virginia Department of Mental Health and Retardation)

[18] *See, e.g.*, Letter from John Carlin, Governor of Kansas, to Rep. Edward R. Roybal, dated February 24, 1984, *reprinted in February 28, 1984 House Aging Comm. Hearing* at 96. Also, Attorneys General for the States of Michigan, Ohio and Wisconsin submitted an *amicus* brief supporting a moratorium on CDI's for individual mentally disabled claimants in *Minnesota Mental Health Assoc.*, 720 F.2d at 965.

[19] Hearings regarding the disability program were conducted in Arkansas, Maine, Massachusetts, Michigan, North Carolina, Ohio, West Virginia, and Wisconsin.

[20] *April 7 and 8, 1983 Senate Aging Comm. Hearing* at 12 - 22 (Statement of Peter J. McGough (GAO)).

II. SSA'S MENTAL DISABILITY POLICY IMPOSED SEVERE AND IRREPARABLE HUMAN COSTS ON THE STATES AND THEIR DISABLED CITIZENS.

The States are keenly aware of and deeply concerned about the severe, prolonged and unnecessary hardship which SSA's challenged policy inflicted on their mentally disabled citizens, those claimants least able to understand the disability determination process or pursue their claims.

One of the most immediate impacts of the policy was to leave many mentally disabled individuals without the funds to feed, clothe or shelter themselves.[21] Unless they could appeal adverse decisions and receive continuing benefits, their SSD and/or SSI benefits stopped abruptly.[22] Since few of these persons could or did return to work,[23] they were forced to become dependent on

[21] *See, e.g.*, New York State Department of Social Services Division of Operations Bureau of Operations Analysis, *Accelerated Continuing Disability Investigation Cessations: A Characteristics Profile of Affected Persons* (July, 1982) [hereinafter cited as New York State CDI Study], *reprinted in July 19, 1982 House Aging Comm. Hearing* at 177 (The typical claimant terminated from benefits under the PCDI program was a single male, age 41, who has no income other than his disability benefits.)

[22] As SSA has admitted, mentally disabled individuals have difficulty appealing adverse disability determinations because they do not understand SSA notices and are unable to complete necessary forms, comply with time limits or present their case. *June 20, 1983 House Aging Comm. Hearing* at 133 (Statement of SSA Deputy Commissioner Paul B. Simmons). Even if a claimant did appeal, until enactment of P.L. No. 97-455 on January 12, 1983, the individual could request continuing payment of only SSI and not SSD benefits pending issuance of a decision by the Administrative Law Judge. For this reason, former SSD recipients were often forced to seek public assistance while pursuing the benefits rightfully due them.

[23] A 1979 SSA study concluded that only 1 in 10 persons denied disability benefits later engages in substantial gainful activity. *See June 30, 1983 House Ways and Means Comm. Hearing* at 239 (Statement of John D. Harris, President, National Council of SSA Field Operations Locals, AFGE).

relatives, borrow from friends, seek private charity, or apply for State and/or locally-funded public assistance. The resulting reduction in income led many claimants to lose their homes, cars and other possessions. Tragically, some became homeless.[24]

Individual claimants were not the only persons to suffer as a result of SSA's mental disability policy. When a claimant's SSD benefits were terminated, the benefits paid to family members on his or her account ceased as well. 42 U.S.C. § 402. The accompanying stress, in households already strained by prolonged illness, medical bills and other financial concerns, caused the dissolution of families.

No less devastating was the incidence of medical decompensation. Claimants' denial or loss of federal disability benefits resulted often not only in a loss of income but also Medicare and/or Medicaid benefits with which to pay for needed medical care.[25] While indigent claimants were sometimes able to obtain State-funded Medicaid benefits,[26] the confusion, anxiety and frustration attendant to abrupt terminations of benefits, long

[24] Official estimates are that 40% of the persons housed in New York City's shelter system have been denied or terminated from federal disability benefits. *City of New York*, 578 F. Supp. at 1119. Nationally, a 1982 study forecast that the numbers of homeless persons would double from the previous year due to the reduction in disability benefits and tight housing market. Study Group on Social Security, *Current Administration of Social Security Disability Programs: Rational Goals, Inadequate Methods, and Irrational Results* 10 (May 28, 1982) [hereinafter cited as Study Group on Social Security Report], *reprinted in May 21, 1982 House Aging Comm. Hearing* at 162.

[25] Medicare Part A (hospital) benefits are paid only to claimants who have been entitled to SSD benefits for 24 months. 42 U.S.C. §§ 426(b); 1395c. At that time, these persons can obtain Medicare Part B (supplemental medical insurance) benefits upon payment of a premium. 42 U.S.C. § 1395o. Medicaid benefits are paid to all SSI claimants upon award of those benefits. 42 U.S.C. § 1396a(a)(10)(A).

[26] These benefits were available through the Medicaid-Medically Needy program, 42 U.S.C. § 1396a(a)(10) (A)(ii), which, as of January, 1985, was provided in 36 States.

delayed appeals periods, and seemingly arbitrary denials took their toll on other claimants' health. Some claimants died from the impairments SSA had ruled were not disabling and many others suffered serious exacerbation of their symptoms.[27]

Such medical setbacks occurred with great frequency to mentally disabled claimants, persons particularly vulnerable to the psychological stress caused by financial loss.[28] Many of them had been placed in community treatment facilities as part of the deinstitutionalization movement begun in the 1960's.[29] These persons were able to survive outside mental hospitals only because they could depend on receiving SSI benefits to meet their living needs and, just as importantly, Medicaid for reimbursement of day treatment programs, medications, psychiatric clinic care, periodic hospitalization, and other necessary medical care. When these benefits were improperly ceased, many claimants suffered swift and severe decompensation resulting in rehospitalization[30]

[27] *See, e.g., February 28, 1984 House Aging Comm. Hearing* at 21 (Statement of North Carolina Governor James B. Hunt, Jr.) (Twenty-eight North Carolinians have died from impairments SSA found not disabling.)

[28] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 27 (Third Edition) March, 1981.

[29] *See, e.g.*, David and Sheila Rothman, *The Willowbrook Wars: A Decade of Struggle for Social Justice* (1984).

[30] *City of New York*, 578 F. Supp. at 1115. *See also September 12, 1983 Subcomm. on Retirement Income Briefing* at 49 (Statement of Joseph J. Bevilacqua, Commissioner, Virginia Department of Mental Health and Retardation). In addition, some persons still hospitalized but deemed ready to be "mainstreamed" into more independent living situations were forced to remain hospitalized when denied SSI benefits. *June 30, 1983 House Ways and Means Comm. Hearing* at 160 (Statement of Karen Litz, Member, Public Policy Committee, National Mental Health Association). Even where these persons prevailed on appeal, they suffered medical setbacks because of the anxiety associated with that process, the delay in obtaining treatment, and the necessity of expending their energies on the appeal rather than on their treatment programs. *Social Security Disability: Boston, Mass.: Hearing Before the Subcomm. on Retirement Income and Employment of the House Aging Comm.*, 98th Cong., 1st Sess. 62 (May 31, 1983) [hereinafter cited as *May 31, 1983 Retirement Income Subcomm. Hearing*] (Statement of Noreen Webber, Social Worker, West Roxbury Mental Health Center).

and, in some cases, suicide.[31]

The challenged policy injured individuals by denying or delaying their opportunity to attempt independent living; but it imposed a larger cost on society as well. It undermined efforts to deinstitutionalize mentally disabled persons[32] and forced State and local governments to pay inpatient hospital costs which were substantially higher than either SSI benefits or community treatment programs. In addition, the delivery of services to other mentally disabled citizens was jeopardized when community residential and day treatment programs, dependent on SSI benefits for continued operation, suffered reductions of funding.[33]

Nothing can fully compensate the thousands of *City of New York* plaintiff class members who suffered when they were wrongly terminated or denied federal disability benefits due to SSA's

[31] *See, e.g., February 28, 1984 House Aging Comm. Hearing* at 75 (Statement of David T. Williams, Director, Governor's Office of Advocacy for Disabled Persons and Chairman, Governor's Task Force on Disability Insurance, State of Ohio) (Fifteen Ohioans committed suicide when, unable to work, they were found ineligible for federal disability benefits.)

[32] The irony of these counter-efforts is seen in the statement of Maryland Attorney General Stephen Sachs to the House Aging Committee:

> We should find the federal government an eager partner – if not the leader – in this effort. Indeed, it has been the stated federal policy since enactment of the Community Mental Health Center Act in 1963 to provide mental health services in community settings. At a minimum, we should expect that the federal government would not hinder our efforts. Unfortunately, this has not been the case. The arbitrary termination of the disabled from the Social Security and Supplemental Security Income (SSI) disability rolls how [sic] stands as a notorious example of the federal government – by direction or accident - hobbling earnest efforts by states to help our less fortunate citizens.

February 28, 1984 House Aging Comm. Hearing at 36 (Statement of Maryland Attorney General Stephen Sachs).

[33] *July 19, 1982 House Aging Comm. Hearing* at 95 (Statement of State Communities Aid Association).

admittedly improper policy. However, at the least, these persons should receive the SSD and/or SSI benefits due them for the period(s) they were disabled. This will occur only if the Second Circuit's decision is affirmed and SSA is required to review these claimants' cases and pay any benefits found due under the proper mental disability policy.

III. SSA'S MENTAL DISABILITY POLICY ALSO FORCED THE STATES TO ASSUME THE FEDERAL GOVERNMENT'S INCREASED ECONOMIC COSTS FOR THE CARE OF THE DISABLED IN CONTRAVENTION OF CONGRESSIONAL INTENT.

As discussed above, disability claimants, largely dependent on SSD and SSI benefits, were left with little or no independent means of support when their benefits were denied or terminated. Many were forced to rely on State and locally-funded forms of public assistance for their basic living needs: food, shelter and medical care. Although the full extent of this reliance is difficult to determine, it did force the State and local governments to assume a substantial proportion of the federal costs for the care of the disabled. The resulting shifting of federal costs was in direct contravention of congressional intent in establishing the federal disability programs. Moreover, the State and local governments have continued and will continue to bear this heavy burden because mentally disabled claimants, unable to appeal, continue to be dependent on State and locally-funded public assistance. This dependence will last until SSA is required to review their adverse decisions and restore the truly disabled to SSD and SSI benefits.

The nature and extent of the federal cost-shifting is revealed in the following review of the types of public assistance provided these individuals.

A. *Disability Claimants Whose Benefits Were Denied or Terminated Were Forced to Rely on Financial Assistance at Substantial Cost to State and Local Governments.*

Financial assistance was provided to individuals denied or terminated from federal disability benefits under two types of programs. General Assistance ["GA"], often characterized as a "last resort" for persons unable to obtain any other form of assistance, is totally funded by the States and localities in which it is available.[34] The income and resource limits for GA eligibility, as well as the benefit amounts, are necessarily low, meaning that, on the whole, only the most needy persons qualify for GA benefits, which are uniformly less than SSI benefits.[35]

A second form of public assistance, Aid to Families with Dependent Children ["AFDC"], was available in all the States. *See generally* 42 U.S.C. §§ 601, *et seq*. To qualify for these benefits, a claimant must have a child, meet certain low income and resource limits, and fall within one of the social criteria (being disabled, widowed, unemployed, etc.). 42 U.S.C. §§ 602, 609. The cost of AFDC benefits is jointly financed with the federal government paying approximately one-half the cost and the State and local governments sharing the remaining cost. 42 U.S.C. § 603.

Disability claimants, including the mentally disabled, were forced to rely on GA and AFDC benefits in substantial numbers:

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[34] Statewide General Assistance programs exist in 33 States. U.S. Dept. of Health and Human Services Office of Ass't Sec'ty for Planning and Evaluation, *Characteristics of General Assistance Programs* (May, 1983). In the remaining States, GA is available in some but not all counties and/or on an emergency, one-time only basis. *Id.*

[35] For example, General Assistance recipients in Chicago receive $144 and medical care limited to $500 inpatient costs and outpatient care limited to certain illnesses as opposed to SSI recipients who receive $314.30 and unlimited medical care under Medicaid. *Social Security Disability Reviews: The Human Costs: Hearing Before the Senate Special Comm. on Aging*, 98th Cong., 2d Sess. 52 (Feb. 16, 1984) (Statement of Joseph Antolin, Legal Assistance Foundation of Chicago).

estimates are that 30% of those persons denied benefits[36] and as many as 61% of the persons whose benefits were terminated[37] would be eligible for GA or AFDC benefits. As high as these figures are, they do not include the "spill-over" effect caused when families separated and spouses and children filed additional AFDC applications.[38] Altogether the cost of paying GA and AFDC benefits to the disability claimants adversely affected by SSA's improper disability determination policies had a severe impact on already overburdened State and local governments' budgets. For example,

- The State of Michigan determined that it would have to replace up to $123 million in federal disability benefits with State-funded benefits if SSA's restrictive policies continued.[39]

- In Illinois, there was a 500–600% increase in applications for the General Assistance program between 1980 and the end of 1982 from persons in Chicago who had lost their SSD and/or SSI benefits. The State expended approximately $10.9 million in 1984 for General Assistance and AFDC benefits for persons whose federal disability benefits had been terminated.[40]

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[36] Michigan Interagency Task Force Report, *reprinted in June 20, 1983 House Aging Comm. Hearing* at 558.

[37] New York State CDI Study, *reprinted in July 19, 1982 House Aging Comm. Hearing* at 208.

Although these statistics included all disabled persons and figures for mentally disabled claimants are not available, estimates can be made on the basis of SSA's statistics that 28.6% of the persons terminated from disability benefits suffered from mental impairments. *See* text at fn. 15, *supra*.

[38] New York State estimated that 8% of the claimants whose disability benefits were terminated had dependents with whom they did not live and that the cessation of benefits to these persons affected an additional 24% persons who would apply for AFDC benefits. New York State CDI Study, *reprinted in July 19, 1982 House Aging Comm. Hearing* at 210.

[39] Michigan Interagency Task Force Report, *reprinted in June 20, 1983 House Aging Comm. Hearing* at 544, 558.

[40] Affidavit of William C. Copeland prepared in support of State of Illinois' intervention, *Young v. Heckler*, Case No. 83-5321 (S.D. Ill. 1984) [hereinafter cited as Copeland Affidavit], paras. 10, 14, 15.

- State General Assistance costs for Pennsylvania residents whose federal disability benefits were denied or terminated were estimated to range between $34,515,756 and $138,063,024 annually.[41]

- The State of West Virginia concluded that it was forced to spend 84¢ for every federal dollar saved as a result of the massive terminations of benefits to disability claimants.[42]

- A New York State study estimated that the cost to the State and its localities in additional GA and AFDC costs for disabled citizens who were terminated from SSD and/or SSI benefits would be between $16.4 million and $26.9 million.[43]

In addition, since AFDC and many GA programs are at least partially county-funded, city and county governments were also severely affected by SSA's improper policies.

- California county officials estimated that one-half to two-thirds of the State's former disability claimants sought county assistance at a cost in Los Angeles County alone of $615,000.[44]

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[41] Mental Health Association of Southeastern Pennsylvania, *Financial Impact on Pennsylvania and Philadelphia on Terminations and Denials of Benefits to SSI/SSDI Applicants and Recipients* [hereinafter cited as Pennsylvania Mental Health Association Report], *reprinted in April 7 and 8, 1983 Senate Aging Comm. Hearing* at 253.

[42] *June 20, 1983 House Aging Comm. Hearing* at 108 (Statement of Rep. Robert Wise).

[43] New York State CDI Study, *reprinted in July 19, 1982 House Aging Comm. Hearing* at 177, 179, 193, 208.

[44] *June 20, 1983 House Aging Comm. Hearing* at 607 (Statement of National Association of Counties).

- Orange County, Florida estimated an unreimbursed health and welfare services cost resulting from SSA's policies of over $300,000.[45]

- A New York City study estimated that in fiscal year 1982, the additional General Assistance costs just for the mentally disabled persons terminated pursuant to SSA's improper policy would be $3,531,889 for the State, $1,483,393 for the City of New York, and $2,048,496 for the other localities.[46]

- Dallas County, Texas estimated that it spent $60,000 per year or 10% of its total public assistance budget on disability claimants who should have been on the federal disability rolls.[47]

From these examples, it is apparent that SSA's policies resulted in a shifting to the State and local governments of a substantial portion of the federal cost for the care of the disabled. While national figures are limited, it was estimated that States might be forced to pay the public assistance costs for as many as 730,000 persons nationwide.[48] As high as the costs of this assistance were, they were not the only costs assumed by the State and local governments.

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[45] *Id.* at 608.

[46] Office of the New York City Council President, *Passing the Buck: Federal Efforts to Abandon the Mentally Disabled* (Jan. 1982), *reprinted in October, 1982 House Aging Comm. Report* at 76, 85, 86.

[47] *February 17, 1984 Joint Hearing* at 43 (Statement of Caroline Blackburn, Director, Dallas County, Texas Department of Human Services).

[48] In April, 1983, the Report of the Michigan Interagency Task Force on Disability forecast that, "Should narrower standards continue to reduce the total pool of eligibles by 40% *and if* (as some states have found) 30% of those denied eventually depend on state-financed programs, *states can expect General Assistance (GA) and Aid to Families with Dependent Children (AFDC) caseloads to increase by about 730,000 persons nationwide.*" [emphasis in original.] Michigan Interagency Task Force Report, *reprinted in June 20, 1983 House Aging Comm. Hearing* at 547.

B. *State and Local Governments Were Also Forced to Assume the Costs of Many Goods and Services Required by Individuals Whose Federal Disability Benefits were Denied or Terminated.*

To the extent that State and locally-funded benefits were less than federal disability benefits, former disability claimants also necessarily required additional goods and services to supplement their GA and AFDC benefits.[49] This took the form of public shelters, food banks, medical care, and various social and rehabilitative services. Since most of these services were funded with State and local revenues, their increased use by disability claimants represented another aspect of the federal shifting of the federal costs for the care of the disabled.

The provision of necessary medical care for disability claimants resulted in costly expenditures for State and local governments. As discussed above, the loss of SSD and SSI benefits resulted in a loss of Medicare and Medicaid benefits respectively. Some State and local governments funded substitute Medicaid benefits for these claimants at substantial costs to the State and local governments. For example, in Pennsylvania, the cost of providing Medicaid benefits to individuals denied or terminated from federal disability benefits was estimated to be $42,609,567 annually.[50]

In large part, these claimants became dependent on public hospitals, clinics, mental health centers, nursing homes, etc.[51] In addition to outpatient care, an estimated 10% of the former SSD and/or SSI claimants required reinstitutionalization.[52] "This

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[49] Developmental Disabilities Law Center, Inc. (Boston, Mass.), *Cost/Benefit Analysis of the Disability Benefits Project* 13 (March, 1985).

[50] Pennsylvania Mental Health Association Report, *reprinted in April 7 and 8, 1983 Senate Aging Comm. Hearing* at 254.

[51] If the claimant cannot or does not obtain Medicaid benefits to pay for this care, its costs could be passed on to other patients through increased health care costs.

[52] Copeland Affidavit at para. 12. *See also* State of Connecticut Office of Protection and Advocacy for Handicapped and Developmentally Disabled Persons.

(Continued on next page)

hospitalization costs the city, the state and the Federal Government $100 to $500 a day—surely an odd way to save the approximately $15 a day that it costs to maintain a disabled person outside of a hospital with Federal disability benefits."[51]

Another cost resulting from SSA's improper policies was the increased use of various emergency services provided by the States and cities. Claimants who experienced long delays in having their disability applications acted on, as well as those whose benefits were terminated abruptly, often had to rely on temporary public shelter, food banks and emergency medical services. Even though these services were necessarily limited and intended to provide only stop-gap assistance, one estimate is that between 5 and 15% of the former claimants sought these services.[54]

SSI and OASDI Redeterminations of Mentally Disabled People 9 (Summer, 1982) (One-quarter of the admissions to one Connecticut mental clinic resulted from SSA's terminations.)

[51] Francine Cournos, M.D. and Richard Herman, "A Federal 'Shell Game' on Mental Disability," Letter to the Editor, *New York Times* (Feb. 11, 1982), *reprinted in May 21, 1982 House Aging Comm. Hearing* at 254, 255.

For example, the State of Illinois spent an estimated $12 million of its own funds in fiscal year 1984 for the hospitalization costs of persons terminated from federal disability benefits. Copeland Affidavit at para. 16. New York State estimated that such rehospitalizations would cost that State $165 million annually. *April 7 and 8, 1983 Senate Aging Comm. Hearing* at 89 (Statement of New York State Department of Social Services Commissioner Cesar A. Perales).

State and local governments also paid the cost, estimated at $1000 per case in New York, of their medical and social services personnel submitting medical documentation of claimants' disability and assisting claimants in the review process. *City of New York*, 578 F. Supp. at 1120.

[54] *Status of Continuing Disability Reviews: Hearing Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 98th Cong., 2d Sess. 97 (March 23, 1984) (Statement of Henry Zimmer, Director, Community Planning and Government Relations Division, United Way of Metropolitan Atlanta).

States also bore increased expenditures for rehabilitation services which were essential to some claimants' obtaining employment and become self-supporting. Federal funding for these services was cut by 97% in fiscal year 1982, from $124 million to only approximately $3 million.[55] The States' only recourse was to reduce the numbers of claimants served or replace federal funds with State monies at substantial additional cost. For example, New York State estimated that these federal cutbacks would result in a denial of vocational services to 2000 SSI claimants and 3000 SSD claimants and that the cost to the State of providing "bare minimum" services for disability claimants terminated in Fiscal Year 1982 alone would be $8,528,893 excluding permanent workshop employment.[56]

State and local governments also assumed other, more indirect, costs as a result of SSA's policy. For example, the arbitrary terminations and resulting disruption in some claimants' lives resulted in a reported increased use of police services in some localities.[57] In addition, it has been estimated that 4% of the former disability claimants were incarcerated.[58]

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[55] *March 16 and 17, 1982 House Ways and Means Comm. Hearing* at 156 (Statement of the Council of State Administrators of Vocational Rehabilitation).

[56] New York State CDI Study, *reprinted in July 19, 1982 House Aging Comm. Hearing* at 211.

[57] *June 30, 1983 House Ways and Means Comm. Hearing* at 136 (Statement of Liane Levetan, Commissioner, DeKalb County, Georgia, on Behalf of the National Association of Counties).

[58] Michigan Interagency Task Force Report, *reprinted in June 20, 1983 House Aging Comm. Hearing* at 586.

C. The Lower Court's Order Should be Affirmed So as to Limit the Economic Costs to the States and Prevent Future Cost-Shifting of the Federal Costs for the Care of the Disabled.

The economic cost to State and local governments, outlined above, was estimated to total between $1.6 and $3 billion, a severe burden on their already overextended budgets.[59] For this reason, some State legislatures had to appropriate further revenues to cover these additional costs. Other States were forced to transfer monies from other programs, thereby reducing the State's ability to serve other needy persons.

These costs represent a continuing heavy burden on State and local governments. That is because claimants who were denied or terminated from federal disability benefits pursuant to SSA's improper mental disability policy were often unable to appeal. Thus, they have required and will continue to require financial assistance, public medical care, and emergency shelter and food until SSA is required to conduct new reviews of the original decisions and restore to the truly disabled persons their SSD and/or SSI benefits.

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[59] Copeland Affidavit at para. 13. These figures should be reduced by the costs for SSI Supplements and Medicaid benefits the States would have assumed (as well as increased by the States' costs for advocacy projects, *see* below) if these claimants had maintained their eligibility for federal disability benefits.

States' attempts to mitigate these costs by funding advocacy projects to represent individual claimaints were partially successful. For example, by appropriating $1,448,565 to the Statewide Disability Benefits Project between March 3, 1983 and December 31, 1984, the Massachusetts Legislature realized a net saving of $4,346,023 in public assistance costs. Developmental Disabilities Law Center, Inc., *Cost/Benefit Analysis of the Disability Benefit Program 13* (March, 1985). Similar projects with similar favorable results were established in Illinois, Michigan, Minnesota, New York, Connecticut and in Sacramento, California, Ramsey County, Minnesota and Fairfax County, Virginia.

An additional, equally unfortunate result of SSA's improper policies was that whatever minimal federal savings[60] which did accrue were obtained at the expense of a substantial *increase* in the total costs for the care of the disabled, both for the federal government[61] and for the State and local governments. As discussed above, the arbitrary terminations resulted in additional applications for AFDC benefits from separated dependents and an estimated 5-15% increase in the use of public emergency services. In addition, at least 10% of the persons terminated from federal disability benefits were rehospitalized at per day inpatient costs to the State and local governments far in excess of the monthly disability grants. The policy, in short, was not only unlawful but unwise.

The *amici* States support an affirmance of the Second Circuit's order. We submit this Court should require SSA to review the cases of all claimants adversely affected by the improper mental disability policy. Only in this way will these individuals be replaced on SSD and/or SSI benefits and thereby end their dependence on State and locally-funded public assistance. And only in this way, will the federal government be deterred from future attempts at lawless cost-shifting such as occurred in this case.

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[60] Federal "savings" from the PCDI program were estimated to be between a $2 billion loss to a possible $547 million saving, depending on the numbers of persons who appealed successfully the termination of their federal disability benefits. Study Group on Social Security Report, *reprinted in May 21, 1982 House Aging Comm. Hearing* at 208.

[61] It has been estimated that the federal administrative costs of conducting CDI's was in excess of $10,000 per case. *May 31, 1983 Retirement Income Subcomm. Hearing* at 15 (Statement of Esther Pina, Chairperson, Ad Hoc Committee on Social Security Disability) for a total federal cost of $350 million in 1983 alone. *June 20, 1983 House Aging Comm. Hearing* at 8 (Statement of Rep. Ike Skelton). These figures do not include the estimated $1660 per case federal court costs (*February 28, 1984 House Aging Comm. Hearing* at 3 (Statement of Rep. Edward R. Roybal)) and additional Justice Department expenditures to defend those cases appealed to federal court. Another federal cost, for the rehospitalization of the estimated 10% of the claimants whose SSD and/or SSI benefits were terminated, may have ranged between $400 million to $1 billion. Study Group on Social Security Report, *reprinted in May 21, 1982 House Aging Comm. Hearing* at 208.

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals for the Second Circuit should be affirmed.

Dated: Chicago, Illinois
January 27, 1986

Respectfully submitted,

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OTIS R. BOWEN, Secretary of Health and Human Services, *et al.*,

Petitioners,

—v.—

CITY OF NEW YORK, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERITES UNION AND THE NEW YORK CIVIL LIBERTIES UNION, AMICI CURIAE, IN SUPPORT OF RESPONDENTS

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Ganem v. Heckler,
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Heckler v. Ringer,
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James v. United States,
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Johnson v. Robison,
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Kuehner v. Schweiker,
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Lindahl v. Office of
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Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982).....passim

Lopez v. Heckler,

725 F.2d 1489 (9th Cir. 1984).....2,12

Marbury v. Madison,
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Matthews v. Eldridge,
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Mental Health Ass'n of Minnesota v.
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Mills v. Habluetzel,
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Pickett v. Brown,
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Reilly v. United States,
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Tyminski v. United States,
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United Mine Workers v. Gibbs,
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42 U.S.C. § 405(g).....passim
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42 U.S.C. § 421(a).....1
42 U.S.C. § 421(d).....1
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42 U.S.C. § 1383(c)(1).....1, 2

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404.905.....2
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404.944-965.....2
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404.968(a)(1).....2
404.981-982.....2
404.987-989.....2
404.1503.....1
416.1407-1421.....1
416.1415.....1
416.1429-1465.....2
416.1467-1483.....2
422.408.....16

Other Authories

Jaffe, The Right to Judicial Review, II. 71 Harv. L. Rev. 769 (1958).....39

Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1 (1983).....39

Note, Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation of Powers, 97 Harv. L. Rev. 778 (1984).....40

Vile, M., Constitutionalism and the Separation of Powers, 328 (1967).....38

INTEREST OF AMICI CURIAE

The American Civil Liberties Union (the "ACLU") is a nationwide, nonpartisan organization of more than 250,000 persons dedicated to preserving and protecting the rights secured by the Constitution. The New York Civil Liberties Union is one of its affiliates.

The ACLU has long worked to uphold the right of access to the courts and has filed numerous briefs, both as counsel for a litigant and as amici curiae, in cases involving this issue. The construction of § 405 proposed by the Secretary would effect a dramatically unfair and unconstitutional denial of judicial access for thousands of disability claimants. With the consent of the parties, indicated by letters being lodged with the Clerk of the Court, we file this brief amici curiae on the important issues of judicial review and due process presented in this case.

SUMMARY OF ARGUMENT

This appeal tests the capacity of the Article III judiciary to afford redress to mentally impaired persons who have been denied disability benefits pursuant to concededly unlawful policies, but who, through governmental misconduct, ignorance or mental incapacity have failed to exhaust the complex set of administrative remedies established by the Secretary or to seek judicial review within sixty days of the completion of the administrative appeal process.[1]

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[1] Disability determinations are initially made by a state agency acting on behalf of the Secretary pursuant to regulations, guidelines and performance standards promulgated by him. See generally, 42 U.S.C. § 421(a); 1383(b) and 20 C.F.R. 404, 1503; 404.903. De novo state agency reconsideration of adverse determinations is generally available, 20 C.F.R. 404.904; 404.907-921; 416.1407-1421, except in disability cessation cases under Title XVI. 20 C.F.R. 416.1407; 1415.

An applicant who believes that the state agency's determination was erroneous may, within 60 days, request a hearing before an Administrative Law Judge. 42 U.S.C. §§ 421(d); 1383(c)(1); 20 C.F.R.
(cont'd next page)

In this case, the Secretary concedes -- as he must -- that thousands of seriously mentally ill claimants were either terminated from or denied disability benefits pursuant to erroneous policies and procedures that violated both congressional intent and the Secretary's own regulations. The Secretary

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404.944-965; 416.1429-1465. See also 42 U.S.C. §§ 405(b)(1); 1383(c)(1). Whether Administrative Law Judges may be instructed by the Secretary to ignore clearly established Circuit Court precedent in determining appeals is currently the subject of litigation in Hyatt v. Heckler, 579 F. Supp. 985 (W.D.N.C. 1984), rev'd 757 F.2d 1455 (4th Cir. 1985) petition for certiorari filed; Lopez v. Heckler, 725 F.2d 1489 (9th Cir. 1984), partial stay granted pending Supreme Court review, 104 S. Ct. 2164 (1984), vacated and remanded in light of Social Security Reform Act of 1984, 105 S. Ct. 583 (1984); Stieberger v. Heckler, 615 F.Supp. 1315 (S.D.N.Y. 1985) (granting injunction), appeal pending.

The adverse decision of an ALJ may be appealed to the Appeals Council, a body appointed by the Secretary, within 60 days. 20 C.F.R. 404.67-983; 416.1467-1483. Judicial review of the Appeals Council decision must be sought within 60 days. 42 U.S.C. § 405(g).

Failure to invoke any stage of the review process within 60 days is deemed by the Secretary to render a rejection binding and no longer subject to review or correction in any forum, except at the unreviewable discretion of the Secretary. E.g., 20 C.F.R. 404.981-982, 955(a), 968(a)(1), 920(a), 921, 933(b), 905. See also, 20 C.F.R. 404.987-989, 903(1).

further recognizes -- as he must -- that the vast bulk of the erroneously rejected claimants are impoverished; are unable to secure counsel; and are subject to serious mental deficiencies that impede their capacity to function effectively in society. Finally, the Secretary acknowledges -- as he must -- that the erroneous policies and procedures pursuant to which thousands of mentally ill claimants were rejected were not publicly acknowledged,[2] rendering it impossible for any claimant to have ascertained that a basis for an appeal from the Secretary's initial rejection existed within the 60 day period required by the regulations.

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[2] The Secretary's repeated refusal to acknowledge the existence of the unlawful policies and procedures are described below at 570 F.Supp. at 1115-1116. Not only did the Secretary refuse to acknowledge the use of the unlawful procedures, he affirmatively mis-stated that they were in use, if at all, only in the Chicago area. 742 F.2d at 738, n.5.

The Secretary insists, nevertheless, that despite the conceded illegality of the past policy and despite the vulnerability and the helplessness of many of the erroneously rejected claimants, Article III courts are powerless to direct the Secretary to reconsider the claimants' applications pursuant to lawful criteria because Congress, in enacting 42 U.S.C § 405(g), has stripped Article III courts of jurisdiction to provide any remedy whatever to disabled persons who failed to exhaust the Secretary's administrative appeals process and to seek judicial review within 60 days of the completion of the appellate process.

The Secretary's jurisdictional argument fails on at least four levels.

First, as the Second Circuit recognized, § 405(g) was not intended by Congress to create a trap for the poor and the helpless by insulating the Secretary's unlawful

actions from judicial correction in settings where administrative exhaustion and speedy resort to the courts was impossible because the very existence of the unlawful eligibility criteria was kept secret by the Secretary until after the time-periods set forth in the regulations and in § 405(g) had expired. It is inconceivable to attribute to Congress an intention to bar judicial relief because a claimant failed to challenge concededly unlawful policies and procedures which were not publicly acknowledged until after the time to challenge them had expired. The Second Circuit was clearly correct, therefore, in holding that the administrative exhaustion and 60 day requirements of § 405(g) were, respectively, waived and tolled during the period when claimants were unaware of the existence of the unlawful criteria.

Second, as the Second Circuit held, to the extent review under § 405(g) is deemed unavailable, Article III courts are empowered under 28 U.S.C. § 1361 to provide relief "in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Where, as here, an officer of the United States owes a duty to disability claimants to consider their claims in accordance with congressionally mandated criteria, Congress' decision in 1962 (23 years after the enactment of § 405(g)) to provide an unqualified grant of power to Article III courts to entertain actions "in the nature of mandamus" provides a clear jurisdictional base for appropriate remedial action. Whatever the issues raised by an attempt to invoke § 1361 as a general alternative to § 405(g), where § 405(g) review was functionally unavailable to

claimants because the Secretary failed to disclose that he was using unlawful policies until after the § 405(g) time periods had run, § 1361 jurisdiction is clearly present.

Third, as this Court noted in Albemarle Paper Co. v. Moody, 422 U.S. 405, 414, n. 8 (1975), Article III courts possess ancillary jurisdiction to entertain the remedial claims of Title VII class-members who have failed to exhaust administrative remedies and limitations periods prescribed by Congress, so long as the named plaintiffs satisfy the jurisdictional pre-requisites and so long as the exercise of ancillary jurisdiction would not frustrate congressional policy. Compare, Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) with Zahn v. International Paper Co., 414 U.S. 291 (1973). Where, as here, the claimants' failure to have exhausted administrative remedies or to have sought

immediate judicial review was attributable to governmental conduct in failing to publicly acknowledge the use of improper policies and procedures until after the § 405(g) time periods had run, as well as to the mental disability, ignorance and poverty of the claimants, it would violate no congressional policy to permit the discretionary exercise of ancillary jurisdiction over members of the class to assure that the most vulnerable segment of the population is not denied the enjoyment of the rule of law.

Fourth, to the extent the exhaustion and 60 day requirements of § 405(g) are deemed to preclude access to an Article III court for claimants who were never on notice that they had a basis for appeal until after the disqualification period had run and who, because of their mental incapacity, ignorance and poverty, failed to comply with § 405(g), the requirements are unconstitutional. Where

Congress has granted a right to judicial review, the Due Process Clause places restrictions upon the government's ability to frustrate the enjoyment of that critical right. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Mills v. Habluetzel, 456 U.S. 91 (1982); Pickett v. Brown, 462 U.S. 1 (1983); Boddie v. Connecticut, 401 U.S. 371 (1971). See also, James v. United States, 459 U.S. 1044 (1983) (Brennan and Blackmun, JJ. concurring in the denial of certiorari). Where, as here, the Secretary's failure to have revealed the unlawful policies in question had the effect of depriving claimants of the ability to invoke timely review of the policies pursuant to § 405(g), the Secretary's action is precisely analogous to the action of the State of Illinois held unconstitutional in Logan v. Zimmerman Brush Co., supra. See also, Mullane v. Central Hanover Bank & Trust Co.,

339 U.S. 306 (1950). Moreover, the attempt to impose extraordinarily short limitation periods on persons whose mental incapacity, poverty and ignorance render it a certainty that many, if not most, will be unable to satisfy them is as offensive to the Constitution as was the attempt to impose unreasonably short limitation periods on illegitimate children seeking to establish paternity in Mills v. Habluetzel and Pickett v. Brown.

Thus, whether one approaches the jurisdictional issue as an exercise in construing § 405(g); an exploration of 28 U.S.C. § 1361 as an alternative basis of jurisdiction; a textbook example of ancillary jurisdiction; or a question of constitutional obligation, an Article III court possesses power to order reconsideration for disability claimants whose applications were denied pursuant to concededly unlawful policies and

procedures that were not made public by the Secretary until after the expiration of time limitations for appeal contained in the regulations and § 405(g).

Acceptance of the Secretary's jurisdictional position would trigger two pernicious effects.

First, it would compel all unsuccessful disability claimants to file protective administrative and judicial appeals, even in those cases in which counsel does not believe a good faith appealable issue exists, since failure to appeal or to sue would be deemed to bar subsequent judicial relief to a claimant, even as to unlawful policies he or she knew nothing about because the Secretary had failed to make them public.

Second, it would encourage bureaucrats under intense pressure to reduce expenditures to adopt legally questionable policies and procedures governing eligibility for

disability benefits, secure in the knowledge that even when such questionable policies are ultimately rejected as unlawful by the courts, thousands of impoverished and uncounselled claimants will be disqualified from judicial relief because they failed to satisfy § 405(g), thus permitting the Secretary to reap a windfall economic benefit from the adoption of unlawful policies, especially if they are kept secret for an extended period of time.

Coupled with the Secretary's repeated insistence on non-acquiescing in clearly established Circuit precedent,[3] the

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[3] Hyatt v. Heckler, 579 F. Supp. 985 (W.D.N.C. 1984), rev'd 757 F.2d 1455 (4th Cir. 1984), petition for certiorari filed; Lopez v. Heckler, 572 F. Supp. 26 (C.D.Cal. 1983); stay denied, 713 F.2d 1432 (9th Cir. 1983), stay granted pending disposition by Court of Appeals, 104 S. Ct. 10 (Sept. 9, 1983) (Rehnquist, J., Circuit Justice), emergency motion to vacate stay denied, 104 S. Ct. 221 (Oct. 11, 1983), with dissenting opinions at 104 S. Ct. 221 (Stevens, J., joined by Blackmun, J.) and 104 S. Ct. 225 (Brennan, J., joined by Marshall, J.), District Court substantially affirmed, 725 F.2d 1489 (9th Cir. 1984), (cont'd next page)

Secretary's wooden approach to jurisdiction would deprive thousands of the nation's poorest and most vulnerable of any protection of the laws, equal or otherwise.

ARGUMENT

I. THE SECRETARY'S FAILURE TO MAKE UNLAWFUL POLICIES AND PROCEDURES PUBLIC CONSTITUTED A WAIVER OF THE ADMINISTRATIVE EXHAUSTION ASPECT OF § 405(g) AND EFFECTED A TOLLING OF THE APPLICABLE 60 DAY STATUTE OF LIMITATIONS.

This Court has recognized that § 405(g) establishes only one non-waiveable jurisdictional pre-requisite -- presentation of a claim to the Secretary. Weinberger v. Salfi, 422 U.S. 749, 763-64 (1975). The two remaining components -- administrative exhaustion and a 60-day limitations period

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partial stay granted pending Supreme Court review, 104 S. Ct. 2164 (April 30, 1984), vacated and remanded in light of Social Security Reform Act of 1984, 105 S. Ct. 583 (Dec. 10, 1984), on remand 753 F.2d 1464 (9th Cir. 1985); Stieberger v. Heckler, 615 F.Supp. 1315 (LBS) (S.D.N.Y. 1985) (granting injunction), appeal pending.

may be waived by the Secretary, or, in appropriate settings, may be deemed satisfied by the courts. Weinberger v. Salfi, supra at 764-67; Matthews v. Eldridge, 424 U.S. 319, 328-332 (1976); Heckler v. Ringer, ___ U.S. ___, 104 S.Ct. 2013 (1984).

In this case, the Second Circuit recognized that the non-waiveable presentment requirement was satisfied by each member of the plaintiff-class. 742 F.2d at 735-736. In addition, the Second Circuit held that the waiveable components of § 405(g) should not be construed to bar jurisdiction because Congress could not have intended to force disability claimants to bring speedy challenges to disability practices that were not made public by the Secretary until after the relevant time-periods had expired. Characterizing administrative exhaustion under such circumstances as "futile" because it could not result in the withdrawal of the

Secretary's unlawful policies, the Circuit deemed the exhaustion component waived in accordance with Matthews v. Eldridge, and Heckler v. Ringer, supra. Recognizing that claimants' request to be re-considered pursuant to lawful policies was "substantially collateral" to an actual demand for benefits, the Circuit upheld the grant of class-wide reconsideration to claimants who, after an initial rejection by the Secretary, had failed to pursue their administrative appeals within 60 days.

The Secretary arques that the Circuit's finding of futility and collaterality was erroneous, since appeals to Administrative Law Judges would, unbeknownst to the claimants, have enabled them to reach decision-makers who were not bound by the Secretary's erroneous criteria.[4] Such a

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[4] ALJs are bound to apply the Secretary's published regulations, formal Social Security Rulings (SSR's) (cont'd next page)

narrow definition of futility would, however, be wholly unwarranted. Once the Secretary has adopted unlawful criteria governing the initial consideration process, individual reversals at the ALJ level can do nothing to vindicate a disabled claimant's right to be judged by lawful criteria in the first place, rather than being forced to pursue a time-consuming appeals process while in desperate need. Accordingly, the ALJ appeals process could not have resulted in vindication of the basic claim advanced by the plaintiff-class -- the right to be judged by lawful criteria

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and, in the view of every court to have passed upon the question, the clearly established law of the Circuit in which they sit. See, 20 C.F.R. 422.408; Stieberger v. Heckler, supra. ALJs are not bound by instructional material furnished by the Secretary to guide state agencies conducting the initial level of administrative scrutiny.

The erroneous policies and procedcures at issue herein were never published as regulations or codified as rulings, precisely because the Secretary did not wish them to be publicly known. They were, however, conveyed to state agencies and were utilized in denying the applications of the members of the plaintiff-class. 742 F.2d at 732, n.1.

at the initial level of administrative consideration.

Moreover, as ALJs testified, the improper record entries caused by the use of the improper policies were often taken at face value by ALJs who did not know that they had been improperly entered and were relied upon in denying claimants' appeals. 578 F.Supp. at 1118. Thus, the Secretary's actions tainted the very procedure he insists that plaintiffs exhaust.

Entirely apart from the questions of futility and collaterality, the Secretary's jurisdictional position requires the Court to ascribe to Congress an intent to require administrative appeals by disability claimants even when the very existence a basis for an appeal was not made public until after the time to appeal had expired. Nowhere in the legislative history of § 405(g) is such a cruel trap for the poor

even hinted. In the absence of a clear legislative statement that the exhaustion component of § 405(g) was intended by Congress to block judicial relief for disability claimants who could not have known of the Secretary's unlawful policies because he refused to acknowledge their existence, the exhaustion component of § 405(g) must be construed as inapplicable to claimants who never had notice of a claim's very existence until it was too late to mount a challenge.

Similarly, the Second Circuit held that the 60 day limitations period within which to seek judicial relief from the Secretary's denial should be deemed tolled during the period of the claimants' justifiable ignorance of the existence of the unlawful policies. Following the characterization utilized by this Court on several occasions,[5]

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[5] Weinberger v. Salfi, supra, 422 U.S. at 763-64; Matthews v. Eldridge, supra, 424 U.S. at 328, n. 9.

the Circuit treated the 60 day period as a statute of limitations and tolled its running during the period when the Secretary was secretly applying the policies.

In construing § 405(g) to permit judicial correction of concededly lawless administrative action in settings where claimants were not made aware by the Secretary of a basis for appeal until the relevant time periods had expired, the Second Circuit correctly applied the strong presumption in favor of judicial review that has characterized this Court's approach to the construction of statutes that are claimed to bar judicial correction of administrative errors of law. E.g., Lindahl v. Office of Personnel Management, 105 S.Ct. 1620 (1985); South Carolina v. Regan, 104 S.Ct. 1107 (1984); Dunlop v. Bachowski, 421 U.S. 560 (1975); Johnson v. Robison, 415 U.S. 361 (1974); Oestereich v. Selective Service

System, 393 U.S. 233 (1968); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

For example, in Lindahl v. Office of Personnel Management, supra, the Court was confronted with a jurisdictional statute providing that decisions of the Federal Office of Personnel Management concerning certain federal employee disability claims "are final and conclusive and are not subject to review." 5 U.S.C. § 8347(c). Applying the presumption in favor of judicial review, the Court construed the statute as authorizing judicial correction of errors of law and serious lapses of procedural regularity.

Similarly, in Oestereich v. Selective Service System, supra, the Court was confronted with a jurisdictional statute that provided:

> "No judicial review shall be made of the classification or processing of any registrant ... except as a defense to a criminal prosecution ... after the registrant has responded either affirmatively or negatively to an order to report for induction ..."

81 Stat. 104.

The Court reasoned, however, that Congress could not have intended to bar pre-induction judicial review of clear errors of law by Selective Service Boards. 393 U.S. at 238-39.

In analogous settings, moreover, this Court has construed congressional statutes imposing time-limits on judicial review to exclude periods during which a claimant was ignorant of the essential elements of a claim. Thus, for example, in Urie v. Thompson, 337 U.S. 163, 169-170 (1949), the Court construed the three year statute of limitations in FELA cases to run only from the point at which a claimant had notice of

an injury, noting that statutes of limitation:

> "... conventionally require the assertion of claims within a specified period of time after notice of the invasion of [their] legal rights.

337 U.S. at 170.[6]

In this case, the Secretary's failure to publicly acknowledge her adoption of unlawful policies prevented claimants from acquiring "notice of the invasion of [their] legal rights" until after the § 405(g) time periods had expired.

In United States v. Kubrick, 444 U.S. 111 (1979), the Court ruled that a medical malpractice claim against the United States accrues at the point when an injured party has both notice of his injury and its cause.

Thus, in Kubrick, if the Veterans' Administration had not revealed to Mr. Kubrick that his ear had been irrigated with neomycin, his claim would not have accrued for statute of limitations purposes until he was placed on notice of the cause of his deafness.

In this case, the Secretary's failure to have publicly acknowledged his adoption of unlawful eligibility policies prevented claimants from learning the "cause" of their injury, and, thus, prevented the accrual of their claim.

The statute at issue in this case, 42 U.S.C. § 405(g), manifests far less hostility to judicial review than did the statutes at issue in Lindahl or Oestereich. On the other hand, the Secretary's jurisdictional position

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[6] The Urie rule has been uniformly applied to claims against the United States under the Federal Tort Claims Act. Quinton v. United States, 304 F.2d 234 (5th Cir. 1962); Hungerford v. United States, 307 F.2d 99 (9th Cr. 1962); Toal v. United States, 438 F.2d 222 (2nd Cir. 1971); Tyminski v. United States, 481 F.2d 257 (3rd Cir. 1973); Portis v. United States, 483 F.2d 670 (4th Cir. 1973); Reilly v. United States, 513 F.2d 197 (8th Cir. 1975); Casias v. United States, 532 F.2d 1339 (10th Cir. 1976); Barrett v. United States, 689 F.2d 324, 327-30 (2d Cir. 1982).

would virtually insulate the Secretary's errors of law from effective judicial correction. Accordingly, in the absence of an overwhelming showing that Congress wished to bar judicial relief to claimants in settings where the Secretary concealed his unlawful activities until the § 405(g) time periods had expired, the Second Circuit's common-sense application of § 405(g) should be affirmed. Under such a construction, the Secretary would be denied the benefit of the waiveable aspects of § 405(g) in those situations where his failure to make unlawful policies public impeded claimants from satisfying the exhaustion and 60 day requirements of the statute. The Secretary cannot have <u>both</u> secret policies and procedures <u>and</u> a requirement that the challenge to those secret policies be mounted forthwith by mentally ill claimants who are understandably unaware of the policies' very existence.

II. THE DISTRICT COURT POSSESSED JURISDICTION UNDER 28 U.S.C. § 1361 TO GRANT CLASS-WIDE RELIEF "IN THE NATURE OF MANDAMUS" COMPELLING THE SECRETARY TO RE-EVALUATE EACH CLAIMANT PURSUANT TO LAWFUL CRITERIA.

In 1962, Congress enacted 28 U.S.C. § 1361, granting District Courts original jurisdiction

> "...in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Not surprisingly, the Secretary does not attempt to argue that § 1361 fails to provide a potential alternative basis of jurisdiction for the entry of a remedial order by the District Court. The Secretary's reluctance to confront the § 1361 jurisdictional issue squarely is readily understandable. In order to avoid review under § 405(g), the Secretary is obliged to argue for a literal reading of its provisions in an attempt to preclude courts from construing § 405(g) as permitting

judicial waiver and tolling of the exhaustion and 60 day requirements in settings where the Secretary's concealment rendered a claimant unaware of the existence of an appealable issue until the § 405(g) time periods had expired. If, however, § 405(g) is to be read literally, a similar literal reading must be applied to § 405(h), which forbids § 1331 and § 1346 jurisdiction in Social Security cases, but which does not purport to oust § 1361 jurisdiction. The Secretary cannot seriously urge a narrow, literal reading of § 405(g), while at the same time seeking to expand the literal scope of § 405(h) to cover § 1361 jurisdiction. Indeed, when Congress enacted § 1361 in 1962 and amended § 405(h) in 1982, it made no attempt to expand § 405(h) to include § 1361, indicating a desire to authorize Article III courts to continue granting appropriate orders "in the nature of mandamus" in disability cases. Similarly,

despite a comprehensive analysis of the disability area in 1984, resulting in substantial reform legislation, Congress, with full knowledge that the Circuits had uniformly found § 1361 jurisdiction in disability cases,[7] made no attempt to amend § 405(h) to include § 1361.

Instead of contesting the potential existence of jurisdiction under § 1361, the Secretary argues that, even if it exists, it is not available in this case because the

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[7] As the D.C. Circuit has noted, an "unfractured consensus in the Courts of Appeals" recognizes the availability of § 1361 jurisdiction in an appropriate disability case. E.g., Ganem v. Heckler, 746 F.2d 844, 850-52 (D.C. Cir. 1984); Ellis v. Blum, 643 F.2d 68, 81 (2nd Cir. 1981); Kuehner v. Schweiker, 717 F.2d 813, 819 (3rd Cir. 1983), vacated and remanded on other grounds, 105 S. Ct. 376 (1984); Starnes v. Schweiker, 715 F.2d 134, 141-42 (4th Cir. 1983) vacated and remanded on other grounds sub. nom. Starnes v. Heckler, 104 S. Ct. 2673 (1984); Mental Health Ass'n of Minnesota v. Heckler, 720 F.2d 965, 971 n. 17 (8th Cir. 1983); Elliot v. Weinberger, 564 F. 2d 1219, 1227 (9th Cir. 1977), aff'd in part on other grounds sub. nom. Califano v. Yamasaki, 442 U.S. 682 (1979); Ryan v. Shea, 525 F.2d 268, 271-72 (10th Cir. 1975).

availability of adequate alternative remedies under § 405(g) precludes the issuance of § 1361 relief "in the nature of mandamus." Heckler v. Ringer, ___ U.S. ___, 104 S.Ct. 2013 (1984). Whatever the validity of the Secretary's argument generally, it is wholly unpersuasive in a setting where the Secretary's failure to make his policies and procedures public rendered it impossible for claimants to ascertain that a basis for appeal under § 405(g) existed until it was too late. Especially where, as here, the claimants in question are impoverished, mentally ill persons, the Secretary can hardly point to § 405(g) as an adequate alternative remedy when the Secretary's own conduct rendered it impossible for claimants to discover that a timely basis for an appeal existed.

Indeed, even if the Secretary had made his unlawful policies public, § 405(g) would

not constitute an adequate remedy precluding relief in the nature of mandamus. Given the poverty and helplessness of most mentally ill disability claimants, § 405(g) will often fail to afford an adequate avenue of judicial redress to an impoverished and mentally ill claimant. When the mental illness of a disability claimant has rendered it impossible for him to qualify for § 405(g) review, a District Court possesses power under 28 U.S.C. § 1361 to make a discretionary determination that § 405(g) failed to provide an adequate avenue of relief and to grant appropriate redress "in the nature of mandamus." See, Parker v. Califano, 644 F.2d 1199 (6th Cir. 1981); Shrader v. Harris, 631 F.2d 297 (4th Cir. 1980).

In any event, whether or not a District Court would have power to find that § 405(g) failed to provide an adequate remedy

generally, when a claimant's failure to have satisfied the requirements of § 405(g) is attributable to the Secretary's failure to have made his unlawful policies public, a District Court possesses clear power under § 1361 to label the § 405(g) route "inadequate", thus triggering the availability of appropriate relief "in the nature of mandamus" pursuant to 28 U.S.C. § 1361.

III. THE DISTRICT COURT POSSESSED ANCILLARY JURISDICTION OVER CLAIMS ASSERTED BY MEMBERS OF THE PLAINTIFF-CLASS.

In Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n. 8 (1975), this Court held that District Courts possessed jurisdiction to award backpay in a Title VII case to those members of the plaintiff-class who had failed to satisfy the statutory subject matter jurisdiction requirements of EEOC administrative exhaustion and a 90 day

statute of limitations, so long as the named-plaintiffs satisfied the exhaustion and 90 day requirements. Although the Albemarle Court did not explicitly characterize the exercise of jurisdiction over class members as ancillary, it would appear to fall squarely within that concept. United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978).

In this case, the named-plaintiffs have individually satisfied the exhaustion and 60 day aspects of § 405(g). Accordingly, the District Court was vested with clear subject matter jurisdiction over the "case or controversy" posed by the individual claimants and may, under UMW v. Gibbs, exercise discretionary ancillary or pendent jurisdiction over closely related claims arising from a "common nucleus of operative fact", even in the absence of an independent

base of jurisdiction, unless the exercise of ancillary or pendent jurisdiction would frustrate a congressional policy. E.g., Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); United Mine Workers v. Gibbs, supra.

In Albemarle, this Court recognized that the congressional policies underlying the administrative exhaustion and 90 day requirements of Title VII were satisfied when the named-plaintiffs exhausted administrative remedies, thereby permitting consideration of conciliation and administrative fact-finding. So long as the claims of class-members raised identical questions of law and fact, the Albemarle Court recognized that congressional policies underlying Title VII would not be advanced by woodenly requiring multiple administrative presentations by each member of the class.

The Albemarle analysis is fully applicable to § 405(g). Once the named-plaintiffs have presented a claim to the Secretary, exhausted his administrative remedies and expeditiously sought judicial relief, the legitimate purposes of § 405(g) have been satisfied. The Secretary has been afforded an opportunity to correct his errors and the issue has been speedily presented for judicial consideration. No legitimate purpose would be served by requiring the identical issue to have been repeatedly -- and futilely -- presented for administrative and judicial consideration. Indeed, the sole consequence of requiring each member of a class of disability claimants to have engaged in multiple administrative exhaustion of the same issue is the creation of an artificial obstacle to judicial relief. While the Secretary has consistently sought to convert § 405(g) from a generous decision by the 1939

Congress to waive the then-existing jurisdictional amount in order to enable disabiity claimants to obtain judicial review,[8] into a mean spirited bar to the judicial protection of the powerless, nothing in the statute's legislative history suggests that Congress wished to require a meaningless proliferation of futile administrative appeals as a precondition to class-wide remedial action by a federal court. Thus, since no congressional policy would be threatened by the exercise of ancillary jurisdiction over those members of the class who failed to exhaust administrative remedies, the District Court possessed discretionary authority to determine whether the efficient administration of justice would

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[8] The jurisdictional amount required for general federal question jurisdiction in 1939 was $500. If Congress had not enacted § 405(g), most disability claimants would have been unable to satisfy the prerequisite for general federal question jurisdiction.

be advanced by exercising ancillary jurisdiction. In those settings where claimants had deliberately by-passed or negligently ignored the administrative process, a District Judge might well decline to exercise ancillary jurisdiction. See Califano v. Yamasaki, 442 U.S. 682 (1978); Norton v. Matthews, 427 U.S. 524 (1976). But where, as here, claimants failed to challenge the use of unlawful policies and procedures within the time limit set by § 405(g) because the Secretary refused to acknowledge their existence, no basis exists to restrict the exercise of ancillary jurisdiction.

It is, of course, true that pendent or ancillary jurisdiction should not be exercised in a manner that frustrates or evades congressional limitations on subject-matter jurisdiction. Thus, in Aldinger v. Howard, 427 U.S. 1 (1976), this Court refused to permit federal courts to exercise pendent

jurisdiction in § 1983 cases over state-based claims against municipalities because Congress had refused to permit municipalities to be sued in federal court as "persons" under § 1983.[9] Similarly, in Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978), this Court declined to permit the exercise of ancillary jurisdiction over a claim by a plaintiff against a non-diverse third party defendant because such a claim would threaten the integrity of Congress' decision to require complete diversity.[10] Finally, in Zahn v. International Paper Co., 414 U.S. 291 (1973), this Court required each

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[9] In Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978), this Court repudiated the narrow definition of "person" espoused in Monroe v. Pape, 365 U.S. 167 (1961) and ruled that municipalities may be sued as "persons" under 42 U.S.C. § 1983.

[10] It is questionable whether the purported third-party defendant in Owen Equipment was properly joined under Rule 14. In fact, Owen Equipment was more accurately characterized as a co-defendant, rendering plaintiff's attempt to assert a claim clearly violative of the requirement of complete diversity.

member of a putative class in a diversity action to satisfy the $10,000 jurisdictional amount in order to respect Congress' decision to require jurisdictional amounts in diversity cases.

Unlike Aldinger, Kroger and Zahn, however, the exercise of pendent or ancillary jurisdiction in Albemarle, Supreme Tribe of Ben-Hur and United Mine Workers v. Gibbs did not undermine a congressional policy. When the same analysis is applied to disability settings, it is clear that, as in Albemarle, the exercise of ancillary jurisdiction over a class of claimants whose failure to have satisfied § 405(g) is attributable to the Secretary's concealment of the existence of unlawful policies and procedures threatens no congressional policy. Indeed, as in Albemarle, congressional policy would be advanced by affording claimants reconsideration under lawful criteria.

IV. THE SECRETARY'S ATTEMPT TO PRECLUDE ARTICLE III COURTS FROM GRANTING EQUITABLE RELIEF TO CLAIMANTS INJURED BY THE UNLAWFUL ADOPTION OF UNLAWFUL POLICIES AND PROCEDURES BECAUSE SUCH CLAIMANTS FAILED TO FILE TIMELY CHALLENGES WOULD DEPRIVE CLAIMANTS OF DUE PROCESS OF LAW, SINCE THE EXISTENCE OF THE UNLAWFUL CRITERIA WAS NOT MADE PUBLIC UNTIL AFTER THE RELEVANT TIME PERIODS HAD EXPIRED.

The American system of separation of powers is premised on a governmental structure under which the legislative branch enacts laws;[11] the executive branch carries them out;[12] and the judicial branch resolves disputes concerning their meaning.[13] See generally, M. Vile, Constitutionalism and the

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[11] E.g., Buckley v. Valeo, 424 U.S. 1, 120-43 (1976); INS v. Chadha, 462 U.S. 919 (1983).

[12] Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[13] Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50, 69 n. 23 (1982) (plurality opinion); United States v. Nixon, 418 U.S. 683, 703-05 (1974); United States v. Klein, 13 Wall 128 (U.S. 1872); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 167 (1803).

Separation of Powers, 328 (1967). Whether the centrality to our constitutional structure of the doctrine of separation of powers implies a constitutional right to judicial review of administrative errors of law, either statutory or constitutional, remains one of the unresolved issues of our fundamental law. Crowell v. Benson, 285 U.S. 22, 54 (1932); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring); Johnson v. Robison, 415 U.S. 361 (1974); Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50, 69 n. 23 (1982) (plurality opinion). See also South Carolina v. Regan, 104 S.Ct. 1107 (1984); Bob Jones University v. Simon, 416 U.S. 725 (1974). But see, United States v. Erika, Inc., 456 U.S. 201 (1982). See generally, Jaffe, The Right to Judicial Review, II 71 Harv. L. Rev. 769 (1958); Monaghan, Marbury and the

Administrative State, 83 Colum. L. Rev. 1 (1983); Note, Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation of Powers, 97 Harv. L. Rev. 778 (1984).

Whatever the resolution of the constitutional question, however, this Court has declined to ascribe to Congress an intent to deprive a litigant of judicial review of administrative errors of law in the absence of an explicit and unmistakeable legislative command. E.g., Lindahl v. Office of Personnel Management, 105 S.Ct. 1620 (1985); Oestereich v. Selective Service System, 393 U.S. 232 (1968).

In this case, far from issuing such a command, Congress has evinced a desire to permit the classic separation of powers model to operate in disability cases by dispensing with the then-existing jurisdictional amount and enacting a specific provision permitting

expeditious judicial review. Thus, whether or not Congress was under a constitutional duty to provide for judicial review in disability cases, no doubt exists that Congress, in enacting § 405(g), elected to vest disability claimants with the opportunity to have the Secretary's errors of law corrected by an Article III court. Where Congress has elected to grant a statutory right of access to a judicial or administrative forum to enforce legal rights, this Court has recognized that the enjoyment of such an important right is a species of "property", the enjoyment of which cannot be frustrated by governmental action that renders it functionally impossible or unfairly difficult to secure judicial review. E.g., Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Pickett v. Brown, 462 U.S. 1 (1983); Mills v. Habluetzel, 456 U.S. 91 (1982); Boddie v. Connecticut, 401 U.S.

371 (1971); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); James v. United States, 459 U.S. 1044 (1983) (Brennan and Blackmun, JJ., concurring in the denial of certiorari).

Thus, while it is, of course, true that access to an adjudicative forum may be conditioned on compliance with reasonable procedural requirements,[14] it is equally true that the Due Process Clause precludes the enforcement of procedural impediments to judicial review that unfairly impede or destroy a statutory entitlement to judicial access.

Thus, for example, in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), the Illinois legislature had barred employment discrimination on the basis of physical handicap and had established an elaborate

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[14] See Logan v. Zimmerman Brush Co., supra at 437.

administrative and judicial procedure for the adjudication of a discrimination claim. One provision of the Illinois statute required the Illinois Fair Employment Practices Commission to hold a fact-finding conference within 120 days of the filing of a complaint. When the Commission did not schedule a conference until the 125th day, the respondent secured a dismissal in the Illinois courts on the ground that the 120 period was both jurisdictional and non-waiveable. This Court ruled that Ms. Logan's statutory entitlement to adjudication of her discrimination claim was a species of property protected by the Due Process Clause, Logan v. Zimmerman Brush Co., supra at 428-431, and that Illinois' refusal to extend the 120 day period to permit consideration of her claim on the merits constituted a destruction of her property without due process of law.

In Logan, the State's inadvertent delay in holding a fact-finding conference unconstitutionally frustrated the statutory entitlement to an adjudicatory forum. In this case, the Secretary's concealment of what he now concedes to have been unlawful policies and procedures until after the § 405(g) time periods had expired similarly frustrated the statutory entitlement of disability claimants to an adjudicatory forum.[15] Where, as here, the Secretary's insistence upon operating under secret

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[15] It is, of course, true that claimants could have filed appeals whether or not they had notice of the unlawful policies. However, when a claimant receives a facially lawful rejection, a decision whether to appeal turns on the existence of a belief that the Secretary acted erroneously. Where a claimant has no reason to believe that incorrect criteria were used, there is often no basis for believing that a mistake has been made and, thus, no good faith basis on which to appeal. 742 F.2d at 738. Moreover, ALJs have testified that use of the Secretary's procedures by intake officials caused notations to be entered in the record that erroneously induced ALJs to believe that the Secretary's denial was premised on medical judgment, thus poisoning the administrative appeal process. 578 F.Supp. at 1118.

procedures made it difficult or impossible for claimants to satisfy the time constraints imposed by § 405(g), Logan v. Zimmerman Brush Co., compels a constitutionally mandated waiver of those time constraints.

Similarly, in Pickett v. Brown, 462 U.S. 1 (1983) and Mills v. Habluetzel, 456 U.S. 91 (1982), this Court invalidated statutes of limitations of up to two years limiting the period during which a child born out of wedlock could judicially establish paternity. Although the Court analyzed the statutes under the Equal Protection Clause, the unreasonably short limitations period would have been equally vulnerable to a Due Process analysis.[16] When a group is granted a statutory entitlement to an adjudicatory

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[16] The close relationship between the Due Process and Equal Protection clauses in this area is borne out by Justice Blackmun's concurrence in Logan. 455 U.S. at 438. The Court found it unnecessary in both Pickett and Mills to reach the Due Process issue.

forum, the government may not burden such an entitlement with unreasonably short time constraints that are virtually certain to exclude large numbers of the group from access to the forum. In Picket and Mills, the Court recognized that many, if not most, children born out of wedlock would be unable to satisfy the two year limitations period. In this case, even shorter periods have been imposed on mentally ill disability claimants, many of whom have difficulty coping with daily life, much less making decisions about whether a good faith basis exists for appealing from the Secretary's rejection. Moreover, when one adds to the general vulnerability of mentally ill disability claimants, the Secretary's concealment of the unlawful policies and procedures until after the relevant time periods had expired, the 60 day time constraints of § 405(g) are far more

burdensome than the two year period invalidated in Pickett.

In Boddie v. Connecticut, 401 U.S. 371 (1971), this Court invalidated a filing fee in divorce cases that impeded access by indigent persons to judicial consideration of their request for a dissolution of the marriage relationship. In this case, mentally ill disability claimants seek access to an adjudicatory forum to enforce a statutory entitlement to insurance benefits that spell the difference between a minimally decent standard of existence and destitution. Denial or termination of disability benefits is the final step that has propelled thousands into a life of despair and homelessness. A tragic parallel exists between the rise of the homeless population in our cities and the Secretary's adoption of unlawful policies and procedures that forced thousands of mentally ill

disability claimants to lose their congressionally mandated lifeline. As in Boddie, elemental concepts of due process of law forbid the Secretary from imposing unreasonably burdensome procedural requirements on mentally ill claimants that unfairly deprive them of access to an adjudicatory forum.

Finally, in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), this Court invalidated a New York procedure that failed to provide adequate notice that a potential claim against a trustee was about to be judicially extinguished. In this case, the Secretary provided each claimant with notice of the rejection of his or her disability claim. The Secretary did not, however, acknowledge the adoption of policies and procedures that tainted what appeared on its face to be a legitimate consideration process. While the Secretary may not be

required to give individualized notice of the precise basis for each rejection, the Due Process Clause does compel the Secretary to acknowledge his policies and procedures publicly in order to permit rejected claimants to ascertain whether a good faith basis for an appeal exists. When, as here, claimants are rejected pursuant to secret decisional criteria, they are deprived of an essential element of notice within the meaning of Mullane.

CONCLUSION

For the above-stated reasons, the decision of the Court of Appeals for the Second Circuit should be affirmed.

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AMICUS CURIAE

BRIEF

FOR ARGUMENT

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No. 84-1923

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,

Petitioners,

vs.

CITY OF NEW YORK, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

~~**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE**~~

AND BRIEF FOR THE CITY OF CHICAGO AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

This case addresses an illegal policy implemented by the Federal Social Security Administration which resulted in the wrongful denial and termination of federal benefits to eligible mentally, disabled persons. The Second Circuit Court of Appeals upheld the invalidation of that policy and ordered the Social Security Administration to assume responsibility for those persons unlawfully denied or terminated from federal benefits.

Because of this policy, the City of Chicago, like other cities, was forced to assume responsibility for the living essentials and medical services for thousands of mentally disabled persons illegally denied or terminated from federal benefit rolls. Cities like Chicago were not prepared to assume this substantial burden. The impact on the City's fisc and stability as a city is substantial, as demonstrated by facts set forth in the City of Chicago's brief.

The City of Chicago submits this brief in support of the Respondents' position that the decision of the Second Circuit Court of Appeals should be affirmed. This brief can assist the Court in assessing the negative impact on large cities of the Social Security Administration's illegal policy.

Therefore, the City of Chicago urges this Court to grant Chicago, through Corporation Counsel, leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

JAMES D. MONTGOMERY
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City of Chicago

By: (Signed) Peggy A. Davis
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BRIEF FOR THE CITY OF CHICAGO AS *AMICUS CURIAE*

I. Interest of the *Amicus Curiae*

The City of Chicago ("City") submits this brief in support of the Respondent City of New York's position that the judgment of the Second Circuit Court of Appeals[1] (*Heckler II*) in this case should be affirmed, and additionally, to demonstrate the negative fiscal and social consequences to cities, specifically Chicago, of the Secretary's

[1] *City of New York, et al. v. Heckler, et al.*, 742 F.2d 729 (2d Cir. 1984).

implementation of illegal, restrictive social security eligibility policies.

The Second Circuit in *Heckler II*, *supra*, upheld a ruling by the Eastern District Court of New York[2] (*Heckler I*) which awarded declaratory and injunctive relief to remedy violations of the Social Security Act and its regulations by petitioner, the Secretary of the Social Security Administration ("Administration" or "SSA"). The ruling in *Heckler I* came after full trial on the merits.

Specifically, the District Court found that, from at least 1980 until mid-year 1983, the Social Security Administration maintained an illegal policy which denied disability benefits to a certain class of mentally ill persons, *Heckler I*, *supra*, at 1115. This policy presumed that mentally ill claimants who did not meet or equal the Administration's restrictive Listing of Impairments necessarily retained sufficient residual functional capacity to do at least unskilled work. *Id.*

This illegal policy was maintained contrary to the Social Security Act which mandates that the Secretary make a realistic, individual assessment of each claimant's ability to engage in substantial gainful activity, *Heckler I*, *supra*, at 1124. These findings are not challenged on appeal.

The systematic implementation of this policy resulted in the wrongful removal of tens of thousands of individuals from the SSA's disability rolls, many of whom turned to cities for assistance. A large number of these persons became dependent on cities for their daily living essentials, that is, food, shelter, clothing and medical care. The consequent negative fiscal and social impact of the denial of

[2] *City of New York v. Heckler*, 578 F.Supp. 1190 (E.D. N.Y. 1984).

benefits to these people on cities, as demonstrated below, is enormous.

II. The Welfare Resources of Cities are Substantially Burdened by the Wrongful Discharge of Mentally Disabled Persons from Federal Benefit Rolls

The District Court in *Heckler I*, *supra*, found that the City of New York had standing to challenge the Administration's policies because that city had suffered direct economic and social injury as a result, that is, the City of New York's welfare resources were substantially burdened by the expensive demands of people abandoned by the federal government, *Heckler I*, *supra*, at 1119. Because many of these mentally disabled people joined the ranks of the homeless population living on city streets, programs providing services for such people were burdened.

Statistical data for individual cities, including Chicago, on the number of mentally disabled persons whose benefits were denied or terminated by the policy at issue is not complete. The policy invalidated in this case was also invalidated in the Chicago Regional Area by the District Court of Minnesota, *Mental Health Ass'n of Minn. v. Schweiker (MHAM)*, 554 F.Supp. 157 (D. Minn. 1982), *aff'd sub nom. MHAM v. Heckler*, 720 F.2d 965 (8th Cir. 1983). Of 1,200 persons in Illinois re-evaluated pursuant to Court order in that case in a five-month period, 605 were found eligible for either SSI or SSD benefits. The negative monetary impact of this illegal policy on cities is demonstrated below.

The numbers of the homeless in American cities are increasing.[3] Various studies show that the chronically psy-

[3] American Psychiatric Ass'n, The Homeless Mentally Ill, A Task Force Report (H.R. Lamb, M.D. ed. 1984).

chiatrically disabled, the group most affected by the policy at issue, constitute a substantial proportion of the homeless population and their numbers have increased over the last several years.[4] That increase is due in part to the SSA's policy which denied and terminated benefits to tens of thousands of eligible mentally disabled persons between 1980 and 1983.

The SSA's policy invalidated by the District Court in *Heckler I* was a nationwide policy until April 1983. As with the City of New York, this policy imposed similar burdens on welfare resources for the homeless mentally ill of many large cities, including Chicago. Various studies have reported that the chronically mentally ill constitute an estimated 20% to 50% of the homeless population in cities such as New York and Chicago.[5]

The 1983 Report of the Mayor's Task Force on the Homeless indicates that the homeless population in Chicago increased significantly from 1981 to 1983; estimates rose from 12,000 in 1981-82 to 25,000 in 1983. This increase has been attributed, in part, to reductions in federal assistance and the inadequacy of local public assistance grants.[6] Statistics show a 500%-600% increase in applications for the General Assistance Program in Illinois between 1980 and the first quarter of 1983 from persons

[4] *Id.*

[5] *Id.*

[6] Persons who receive state public aid in Illinois receive 32% of what is considered to be United States poverty level income as determined by the U.S. Department of Agriculture. By contrast, Social Security Insurance and Social Security Disability benefits are at 150% of poverty level.

in Chicago who had lost their Social Security Disability and Social Security insurance benefits.[7]

The City of Chicago provides food, emergency shelter and medical care for its homeless population, a group which includes a significant proportion of the chronically mentally ill.

The City of Chicago Emergency Services Program (ESP) provides social services on a 24-hour basis to needy Chicago residents. One such service is emergency shelter for the homeless. People are placed at City-funded shelters or the City provides voucher payment for shelter at various privately owned facilities. In 1982, the City provided voucher payments for emergency shelter for 2,122 persons. That number rose to 3,715 in 1983, a 75% increase. The cost of the voucher payment program in 1984 was $171,228. Additionally, the City spent over $1.1 million for building and renovating emergency shelters in 1983. Despite these expenditures, during the month of April, 1983, ten emergency shelters in the City reported turning away 6,000 people due to lack of available space.[8]

The Chicago Department of Human Services, through its Emergency Food Program (CEFP), distributes prepackaged nutritionally balanced food boxes to those in need, including the homeless, five days a week at 16 City-operated sites in Chicago. That agency reported an 851.9% increase from 1981 to 1983 in demand for food through

[7] Affidavit of William C. Copeland filed in support of State of Illinois' intervention motion, *Young v. Heckler*, case No. 83-5321 (S.D. Ill. 1984).

[8] Report of the Mayor's Task Force on the Homeless, November 1984; D. Salerno, K. Hopper and E. Baxter, Hardship in the Heartland, Homelessness in Eight U.S. Cities (June 1984).

CEFP.[9] The cost of this program in 1984 was approximately $5 million.

The City of Chicago provides free health services for the mentally ill who cannot afford to pay. There are approximately 381,000 patients registered for health care services at the Chicago Department of Health. The Chicago Bureau of Mental Health estimates that, of that number, about 15,500 are treated each year for some form of mental illness at 19 City-operated mental health treatment facilities. Of that 15,500, approximately 9,000 are treated for chronic mental illness. The total cost for running just one City mental health facility for one year is estimated at $500,000. City funds account for one-half of that total cost.

III. Conclusion

As discussed above, the Secretary's illegal policies caused cities, including Chicago, to spend hundreds of thousands of dollars in order to provide living essentials and medical services for mentally disabled persons unlawfully denied or terminated from federal benefit rolls.

Further, the City of Chicago's burden was not limited to monetary expenditures. The inability of this City to fully provide for its needy citizens has a negative impact on the stability of the City as a whole.

Experts testified at trial in *Heckler I* that the nature of the mental illness which affects the class at issue is such that it impairs their ability to deal with bureaucracies. "The mentally ill are particularly vulnerable to bureaucratic errors." *Heckler I*, *supra*, at 1115. Many did not appeal the loss of their federal benefits, others suf-

[9] Report of the Mayor's Task Force on Hunger, October 1984.

fered a severe medical setback, e.g., slipping into acute paranoia or becoming suicidal. *Id.* It can be assumed that these disabilities and setbacks rendered many of these persons incapable of doing very much beyond wandering city streets. Additionally, this City reported turning thousands of people away from emergency shelters and turning down thousands of requests for food from emergency pantries and the like despite the expenditure of substantial monies.

The inability to provide for the needs of its citizens has an adverse impact on the stability of cities. The Mayor's Task Force on Hunger in Chicago reported in 1984 that hunger is an epidemic in Chicago which threatens to rob the City of its "most valuable resource: a physically and mentally healthy population."[10] With regard to the inability of the City to provide for its estimated 25,000 homeless citizens, Mayor Harold Washington said it is "an indictment of us as a people. It is a hard condemnation of our standards of humanity and fair play."[11]

The Secretary's illegal policy forced cities and other local governments to assume a substantial proportion of the federal government's responsibility for the care of the mentally disabled. The City of Chicago's expenditures on behalf of the homeless mentally ill have significantly increased but remain insufficient to fully cover that responsibility, in part because of the SSA's illegal policy.

The decision of the Second Circuit Court of Appeals in this case must be affirmed. It is only in this way that

[10] Report of the Mayor's Task Force on Hunger, October 1984.

[11] Report of the Mayor's Task Force on Emergency Shelter, "Homelessness in Chicago," October 1983; United States Conference of Mayors, Homelessness in American Cities, Ten Case Studies, A Task Force Report, June 1984.

cities can begin to be recompensed for the burden on their welfare resources accomplished by the Secretary's policies invalidated therein.

Respectfully submitted,

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